BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED:

Whether the Court of Appeals for the Ninth Circuit correctly held that Arizona's construction of its "especially heinous ... or depraved" aggravating circumstance in this case violated the rule of Godfrey v. Georgia and Maynard v. Cartwright.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Facts 1

B. Trial Court Proceedings . 9

C. Proceeding in the Arizona Supreme Court 13

D. Federal Habeas Corpus Proceedings 17

SUMMARY OF ARGUMENT 23

ARGUMENT 29

I. INTRODUCTION 29

II. MAYNARD AND GODFREY DICTATE THE COURT OF APPEALS' CONCLUSION THAT THE ARIZONA "ESPECIALLY HEINOUS ... OR DEPRAVED" CIRCUMSTANCE FAILED TO SERVE ITS CONSTITUTIONAL NARROWING FUNCTION 38

A. The Arizona Supreme Court's Construction of the "Especially Heinous ... or Depraved" Circumstance Runs Afoul of the Eighth Amendment Rule of Maynard 38

B. The Arizona Courts' Application of the "Heinous ... or Depraved" Aggravating Circumstance in Mr. Jeffers' Case Runs Afoul of the Eighth Amendment Rule of Godfrey 74

III. ARIZONA'S EFFORTS TO AVOID THE CLEAR DICTATES OF MAYNARD AND GODFREY BY CREATING A SPURIOUS "STANDARD OF REVIEW" ISSUE ARE UNAVAILING 91

CONCLUSION 107

APPENDIX A: Arizona Revised Statute § 13-703 ..... A-1

APPENDIX B: Arizona Trial and Supreme Court Treatment of the (F)(6) Aggravating Circumstance, 1974-89 ..... B-1

TABLE OF AUTHORITIES

Cases	Page
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), petition for cert. filed	passim
Arizona v. Rumsey, 467 U.S. 203 (1984)	31
Barclay v. Florida, 463 U.S. 939 (1983)	31, 32, 37, 96
Cabana v. Bullock, 474 U.S. 376 (1986)	103
California v. Brown, 479 U.S. 538 (1987)	32
California v. Ramos, 463 U.S. 992 (1983)	77
Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), aff'd, 486 U.S. 356 (1988)	passim
Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987)	20
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1985)	43

Cuyler v. Sullivan, 446 U.S. 335 (1980)	104
Drope v. Missouri, 420 U.S. 162 (1975)	104
Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), rev'd on other grounds, 455 U.S. 104 (1982)	50
Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865 (1983) ..	96
Francis v. Franklin, 471 U.S. 307 (1985)	104
Furman v. Georgia, 408 U.S. 238 (1972)	passim
Gardner v. Florida, 430 U.S. 349 (1978)	32
Godfrey v. Georgia, 446 U.S. 420 (1980)	passim
Gregg v. Georgia, 428 U.S. 153 (1976)	31, 33, 35, 42, 71, 97
Haynes v. Washington, 373 U.S. 503 (1963)	99
Jackson v. Denno, 378 U.S. 368 (1964)	100

Jackson v. Virgina, 443 U.S. 307 (1979) 21, 34, 95, 96, 105

Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), cert. granted, 110 S. Ct. 232 (1989) ..... passim

Jeffers v. Ricketts, 627 F. Supp. 1344, aff'd in part and rev'd in part, 832 F.2d 476 (9th Cir. 1987), cert. granted, 110 S. Ct. 232 (1989) 6, 7, 17, 60, 81

Lockett v. Ohio, 438 U.S. 586 (1978) 9

Lowenfield v. Phelps, 484 U.S. 213, 108 S. Ct. 546 (1988) ... 30, 32, 95, 96, 101

Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), cert. denied, 110 S. Ct. 291 (1989) 96

Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853 (1988) .. passim

McCleskey v. Kemp, 481 U.S. 279 (1987) 32, 44, 97, 105

Miller v. Fenton, 474 U.S. 104 (1985) 100, 101

Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860 (1988) .. 103

Mincey v. Arizona, 437 U.S. 385 (1978) 100

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) 37,43, 44

Norris v. Alabama, 326 U.S. 271 (1945) 104

Penry v. Lynaugh, 109 S. Ct. 2934 (1989) 103

Proffitt v. Florida, 428 U.S. 242 (1976) 42, 45, 47

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983) 37, 56, 57, 106

Pulley v. Harris, 465 U.S. 37 (1984) 54, 30, 72

Rogers v. Richmond, 365 U.S. 534 (1961) 100, 101

Smith v. Phillips, 455 U.S. 209 (1982) 28, 43

State v. Arnett, 125 Ariz. 201, 608 P.2d 778 (1980) 60

State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978) 69, 89

State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), cert. denied, 109 S.Ct. 3200 (1989) 44, 48, 49, 50, 69

State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882 (1982) 60, 89

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) 54, 62, 86

State v. Carr, 154 Ariz. 468, 743 P.2d 1386 (1987) 60, 86, 89

State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), cert. denied, 471 U.S. 1111 (1985) 48, 67

State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980) 49, 65, 88

State v. Ceja, 115 Ariz. 413, 565 P.2d 1274, cert. denied, 434 U.S. 975 (1977) 49, 88

State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) 84

State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986) 49, 50, 64, 67

State v. Cruz-Mata, 138 Ariz. 370, 674 P.2d 1368 (1983) 62

State v. Dixon, 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943 (1974) 45, 47

State v. Fisher, 141 Ariz. 227, 686 P.2d 750, cert. denied, 469 U.S. 1066 (1984) 68, 88

State v. Fulminante, 161 Ariz. 237, 778 P.2d 602 (1988), petition for cert. filed 48, 64, 69

State v. Gerlaugh, 144 Ariz. 449, 698 P.2d 694 (1985) 84, 88

State v. Gillies, 142 Ariz. 564, 691 P.2d 655 (1984), cert. denied, 470 U.S. 1059 (1985) 69, 84

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983) 64, 65

State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244 (1984) 68

State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) 55, 57, 61, 87

State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, cert. denied, 461 U.S. 971 (1983) ..... passim

State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984) 48

State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983), cert. denied, 465 U.S. 1013 (1984) 50

State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984) 67

State v. James, 141 Ariz. 141, 685 P.2d 1293, cert. denied, 469 U.S. 990 (1984) 48, 61, 55, 66

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, cert. denied, 464 U.S. 865 (1983) .. 13, 49, 50, 54

State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985) 49, 62, 63, 68

State v. Kinkade, 147 Ariz. 250, 709 P.2d 884 (1985) 86

State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978) 46, 69, 77

State v. LaGrand, 153 Ariz. 21, 734 P.2d 563, cert. denied, 484 U.S. 872 (1987) 57, 88

State v. Lamb, 142 Ariz. 463, 690 P.2d 764 (1984) 87

State v. Lambright, 138 Ariz. 63, 673 P.2d 1 (1983), cert. denied, 469 U.S. 892 (1984) .. 61, 84

State v. Libberton, 141 Ariz. 132, 685 P.2d 1284 (1984) 44

State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979) 49, 63

State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, cert. denied, 449 U.S. 873 (1980) 48, 62, 69, 86

State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670, cert. denied, 474 U.S. 975 (1985) 48, 61, 68

State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, 467 U.S. 1220 (1984) . 57, 64, 88

State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983) 62

State v. Moorman, 154 Ariz. 578, 744 P.2d 679 (1987) 55, 68

State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 456 U.S. 984 (1982) .. 50, 65

State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), aff'd, 476 U.S. 147 (1986) 54, 62

State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983) .. 44, 50, 60, 63, 69, 89

State v. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) 60, 87

State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312, cert. denied, 471 U.S. 1094 (1985) 65, 68

State v. Rossi, 146 Ariz. 359, 706 P.2d 371 (1985) 84

State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983 (1982) .. 68

State v. B. Smith, 146 Ariz. 491, 707 P.2d 289 (1985) 48, 49, 54, 62, 63, 69

State v. R.D. Smith, 138 Ariz. 79, 673 P.2d 17 1983), cert. denied, 465 U.S. 1074 (1984) . 60, 61, 67, 89

State v. R.L. Smith, 141 Ariz. 510, 687 P.2d 1265 (1984) 61, 63, 68, 87

State v. Steelman, 126 Ariz. 19, 612 P.2d 475, cert. denied, 449 U.S. 913 (1980) .. 54

State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983) 63, 68

State v. Ricky Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882 (1982) 48

State v. Vaughn, 147 Ariz. 28, 708 P.2d 453 (1985) 86

State v. Vickers, 159 Ariz. 532, 768 P.2d 1177 (1989) 54

State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) 48, 84

State v. Villafuerte, 142 Ariz. 323, 690 P.2d 42 (1984), cert. denied, 469 U.S. 1230 (1985) 63, 65

State v. Wallace, 160 Ariz. 424, 773 P.2d 983 (1989), petition for cert. filed 49, 50, 54, 68

State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986), cert. denied, 483 U.S. 1011 (1987) 44, 59, 66

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979) 10, 45, 60, 89

State v. Williams, 1987 W.L. 878 (Ariz. Oct. 8, 1987) 55

State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1983) 50

State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22, cert. denied, 462 U.S. 1124 (1983) 48, 50, 54, 65, 66, 67, 68

Stein v. New York, 346 U.S. 15 (1953) 100

Teague v. Lane, 109 S. Ct. 1060 (1989) 66

Tison v. Arizona, 481 U.S. 137 (1987) 103

United States v. New York Telephone Co., 434 U.S. 159 (1977) 43, 93

Washington v. Yakima Indian Nation, 439 U.S. 463 (1978) .. 43

Zant v. Stephens, 462 U.S. 862 (1983) ..... passim

Statutes

Ariz. Rev. Stat. § 13-703 (1989) 1, 10, 11, 31

Other Authorities

Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases, 64 N.C.L. Rev. 941 (1986) 70

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986) 42, 43

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited in Petitioner's Brief, this case involves Arizona Revised Statute § 13-703, which is set forth in Appendix A to this Brief.

STATEMENT OF THE CASE

A. Facts

In May 1973, the defendant Jimmie Wayne Jeffers and the victim Penelope Cheney met in a heroin rehabilitation program in Tucson, Arizona and began dating. T. 15: 156-59.[1] Ms. Cheney was addicted to heroin then and almost continuously until her death five and one-half years later; so was Mr. Jeffers until his subsequent arrest. T. 10:94-95, 14:17,

---

[1] "T." refers to the transcript of the guilt-innocence trial, followed by the volume and page numbers cited. "T." preceded by a date refers to transcripts of proceedings other than the guilt-innocence trial, which are identified by date.

15:10-12, 15:154-55.

In October 1975, Ms. Cheney moved in with Mr. Jeffers, and the two lived together off and on until they were arrested in May 1976 for possession of narcotics and stolen property. T. 15:159. During their residence together, Mr. Jeffers financed their substantial drug habits, and the two conducted a stormy relationship characterized by frequent arguments and brief separations. T. 10:77-83, 10:91, 15:17-18, 15:28, 15:104, 15:173-80; Apr. 14, 1978 T. 59.

After their arrest, Mr. Jeffers, remaining incarcerated himself, posted bond for Ms. Cheney, paid for his attorney to represent her in the case, and continued supporting her financially. 14:135-45, 15:188-89. During the late spring and summer of 1976, Ms. Cheney dropped out of the drug rehabilitation

program in which Mr. Jeffers had persuaded her to enroll, used the rent money Mr. Jeffers had provided her to buy drugs, moved in first with one and then with another male friend of Mr. Jeffers, stopped visiting him in jail and began visiting another inmate in the same cell block, and provided information to the police -- about which their joint attorney informed Mr. Jeffers -- concerning Mr. Jeffers' heroin supplier and other associates. T.6:118, 10:57-58, 10:70-71, 10:81-82, 11:137, 15:16-17, 15:85-86, 15:189-94, 16:51-63.

Mr. Jeffers was released from jail on bond on October 8, 1976. On October 15, he met Ms. Cheney and proposed that they again live together. T. 16:75-78. Ms. Cheney informed Mr. Jeffers that she had become a prostitute to support her drug habit and had moved in with the man with

whom she was sharing the proceeds of her work. Ms. Cheney then demanded money and drugs in return for sexual relations with Mr. Jeffers. T. 5:100-01, 10:73-75, 14:24, 16:75-87.

A few days later, Mr. Jeffers invited Ms. Cheney to the motel room he shared with Doris Van Der Veer, offering Ms. Cheney heroin and proposing that she give up prostitution and come back to live with him.[2] T. 5:102, 16:96-98. On October 21, 1976, Ms. Cheney telephoned in the morning to say that she was on her way over. Ms. Van Der Veer subsequently found Mr. Jeffers "showered, shaved and

[2]Mr. Jeffers met Ms. Van Der Veer several hours after learning that Ms. Cheney had become a prostitute. Ms. Van Der Veer spent that night and the next two months with Mr. Jeffers. T. 6:96-100. A convicted drug dealer, Ms. Van Der Veer had been involved in smuggling cocaine from Mexico in the preceding months and was dealing marijuana in Tucson. T. 5:82, 6:79-80, 6:218-19, 19:53-54; Mar. 6, 1978 T. 6-8.

changed" and visibly "happy and excited" at the prospect of Ms. Cheney's visit. At Mr. Jeffers' request, Ms. Van Der Veer agreed to leave the room when Ms. Cheney arrived so that Mr. Jeffers could "talk to [Ms. Cheney] about going back with her." T. 5:106, 6:138. Ms. Van Der Veer was gone two and one-half hours. T. 5:113-17. During this time, she once saw Mr. Jeffers and Ms. Cheney leave the room for a moment to buy cigarettes; they were "laughing and smiling and holding hands." T. 5:116, 6:143.

When Ms. Van Der Veer returned to the motel room, she witnessed Ms. Cheney's death. What occurred, as the trial judge in his sentencing order based upon Ms. Van Der Veer's testimony, was this:[3]

[3]These events "were not reported [to the police] until three months later despite Van Der Veer being an eyewitness" -- a three-month period during which Ms. Van Der Veer was in frequent

> Alone with the victim in the motel room, the defendant proceeded to give her heroin which she administered herself or which he administered to her. She was an heroin addict. After the initial injections, the defendant subsequently injected large dosages of heroin into the victim.[4]
>
> When Doris Van Der Veer returned to the room, the victim was lying part on and part off the bed on her back. She was cyanotic. The defendant had a

---

telephone and face-to-face contact with state law enforcement officials pursuant to her activities as a paid informant of the Arizona state police agency in regard to drug trafficking in Tucson. Jeffers v. Ricketts, 627 F. Supp. 1334, 1347 (D. Ariz. 1986); T. 6:43-55, 7:47-48, 7:116-34, 8:70, 8:82-89. Because Ms. Van Der Veer refused to talk to the police or to testify until being granted immunity for two federal weapons violations and "heroin transactions, marijuana transactions, [armed] burglary, and ... [being an] accessory to murder," Ms. Van Der Veer's "[c]redibility ... was in issue." Jeffers v. Ricketts, 627 F. Supp. at 1344. See T. 5:83, 6:15, 6:217-19, 7:55-67, 7:130-31, 8:54, 8:63, 8:98-110, 8:113-15, 9:171, 9:193-97, 12:107-09, 13:144-59.

[4]Every prosecution and defense witness who knew Ms. Cheney testified that she "had an enormous appetite for heroin" (T: 5-105) and had a history of injecting or ingesting as much heroin or "any narcotic" as "she could get her hands" on at one time, often lapsing into unconsciousness when she did so. T. 10:81, 10:94-97, 11:119, 11:122, 14:19, 14:44, 15:18-22, 15:96-99, 15:185.

> gun in his hand and after order[ing] Van Der Veer to lock the door and stay in the room, he tied the victim's arms and injected some additional heroin into her hand.
>
> He asked Van Der Veer to check the victim and see if she was still alive. Van Der Veer did and and [sic] determined that the victim was still breathing although there was hardly any pulse, and she had started to foam at the mouth.
>
> The defendant then strangled the victim with a belt and with his hands until her breathing did stop. During all this period of time, the victim was completely limp and unable to resist in any way.
>
> . . . .
>
> Shortly thereafter the defendant beat the dead victim with his hands about the face four or five times.[5] He then took the victim off the bed and placed her body in the shower stall in the motel room where it remained for three days.

J.A. 13-14 (footnotes added).

The trial court found that Mr. Jeffers

---

[5]"While striking the victim," Mr. Jeffers cursed her and "stated that each blow was for one of the persons [whose arrest] ... Jeffers believed Penny [Cheney] to have been responsible for ...." Jeffers v. Ricketts, 627 F. Supp. at 1360.

"may have had reason to be provoked" and "was under some [emotional] stress" due to Ms. Cheney's rejection of his proposal that they live together again and her insistence that any resumption of relations between them be predicated on his paying her money or drugs. J.A. 16. See Apr. 14, 1978 T. 62-65; June 20, 1980 T. 9-10, 16-17. The court also found that Mr. Jeffers was a heroin addict and "was both drinking and using narcotics on the day of the offense." J.A. 15. See T. 5:103-04, 5:137-38, 6:213-15; Apr. 14, 1978 T. 62-64; June 20, 1980 T. 11, 16, 43-44, 77-79. Ms. Van Der Veer testified that a few weeks after Ms. Cheney died, Mr. Jeffers became so depressed about her death that he attempted to and nearly did commit suicide, injecting at least eight doses of heroin and ingesting substantial quantities of valium, darvon, chloro-

hydrate tablets (a sleeping pill), and whiskey. T. 6:33-34, 7:110-11 9:178-79, 9:220-21, 14:164-71, 17:42-45.

B. Trial Court Proceedings

On February 9, 1978, a jury convicted Mr. Jeffers of premeditated first-degree murder.

Two months later, the trial judge conducted a sentencing hearing at which he sentenced Mr. Jeffers to die. Apr. 14, 1978 T. 52-82. J.A. 5-10. Following this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the Arizona Supreme Court remanded Mr. Jeffers' case for resentencing under a procedure permitting broader consideration of mitigation. See State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), procedure codified in Ariz. Rev. Stat. § 13-703.

Under that procedure, the trial judge

could not impose a death sentence unless the state proved at least one statutorily enumerated aggravating circumstance beyond a reasonable doubt. He was required to "impose a sentence of death if ... [he found] one or more ... aggravating circumstances" and Mr. Jeffers did not establish one or more "mitigating circumstances sufficiently substantial to call for leniency." Id. § 13-703(E). To determine whether the mitigation warranted leniency, the trial court had to "determine whether the factors in mitigation outweigh[ed] the aggravating circumstances." J.A. 66. See Ariz. Rev. Stat. § 13-703(E).

Two days before the 1978 sentencing hearing, the Assistant County Attorney had informed counsel for Mr. Jeffers that he did not think the murder qualified as "especially heinous, cruel or depraved"

under Arizona's (F)(6) aggravating circumstance, id. § 13-703(F), because the victim did not experience any pain. Apr. 14, 1978 T. 24, 37-38, 42. Yet at both sentencing hearings the prosecutor submitted the (F)(6) circumstance as well as the circumstance defined by subsection (F)(2): that the defendant created a grave risk of death to another person in the commission of murder. Ariz. Rev. Stat. § 13-703(F)(2). Apr. 14, 1978 T. 37-38.[6]

In 1978 and again in 1980, the trial judge found both aggravating circumstances. Each time he emphasized the conjunctive nature of his finding that "[t]he defendant committed the

---

[6]At both proceedings, Mr. Jeffers argued that, unless limited to torture, the "heinous, cruel or depraved" circumstance was unconstitutionally vague and overbroad, citing (in 1980) Godfrey v. Georgia, 446 U.S. 420 (1980). Apr. 14, 1978 T. 37-44; July 10, 1980 T. 196.

offense of first degree murder in an especially heinous, cruel, and depraved manner." J.A. 7, 12. See Apr. 14, 1978 T. 37; June 20, 1980 T. 3. At the first sentencing hearing, the trial court explained its (F)(6) finding only by stating that "[t]he Court has considered the defendant's behavior ... after the death of the victim." J.A. 8. In 1980, the court followed its finding with the statement of facts quoted above on pp. 6-7.[7] J.A. 12-14.

After hearing additional evidence in mitigation at the 1980 proceeding, the trial judge concluded "that there are no mitigating circumstances." J.A. 15. He thereupon resentenced Mr. Jeffers to

[7]The court based its "grave risk" conclusion on the jury's conviction of Mr. Jeffers of assaulting Ms. Van Der Veer by pointing a gun at her when she returned to the motel room. J.A. 6, 14.

die. J.A. 16.

C. Proceedings in the Arizona Supreme Court

On direct appeal, the Arizona Supreme Court affirmed Mr. Jeffers' convictions. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983). J.A. 17. With regard to his death sentence, the court reversed the trial court's determination that Mr. Jeffers "knowingly created a grave risk of death to another person,"[8] and also reversed the trial court's conclusion that the defendant "committed the offense in an especially ... cruel ... manner:"

> [T]he element of cruelty was not proven. There was no evidence that the victim suffered any pain. It appears

[8]The court noted that its "grave risk" decisions involved "indiscriminate attacks in which the murderous act itself [had] put others in a danger zone, such as bombing an inhabited building" and refused to "stretch the statute to the extreme length" to which the trial court had stretched it. J.A. 58-59.

> from the record that after the injection of heroin, the victim lost consciousness and never regained it before she died. Therefore, the victim experienced no pain or mental suffering and the murder was not 'cruel' for purposes of A.R.S. § 703(F)(6).

J.A. 60.

Coming to the last remaining basis on which it could sustain Mr. Jeffers' death sentence, the Arizona Supreme Court noted that the "sentencing judge apparently based his finding that the murder was 'especially heinous ... and depraved' on Doris [Van Der Veer's] testimony that appellant strangled the victim while she was totally unable to resist, beat the dead victim about the face and reviled her" and on "appellant's [manner of] disposing of the body." J.A. 60-61. Foreswearing reliance on the latter factor -- on which, the supreme court acknowledged, the trial court "largely"

had relied -- the supreme court concluded that "the events surrounding the murder itself support the trial court's finding that the murder was 'especially heinous ... and depraved.'" J.A. 61-62. In reaching this conclusion, the court referred to dictionary definitions of "heinous" as "'hatefully or shockingly evil; grossly bad'" and of "depraved" as "'marked by debasement, corruption, perversion or deterioration.'" It noted two factors that its recent decision in State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983), had extracted from previous cases and identified as ones "such as" those that capital sentencing judges could consider (but need not rely on): "the infliction of gratuitous violence on the victim" and "the apparent relish with which the defendant commits the murder." It then concluded that Mr. Jeffers' words

and actions at the time of the killing "establish that the offense was committed in an especially heinous and depraved manner." J.A. 60-63.

After reviewing the evidence in mitigation -- inter alia, provocation, emotional stress, and intoxication -- the Arizona Supreme Court replaced the trial court's "no mitigating circumstances" finding with the finding that Mr. Jeffers had shown "no mitigating factors sufficiently substantial to ... outweigh the aggravating circumstance[]." J.A. 66. It rejected Mr. Jeffers' Godfrey challenge to the "heinous, cruel or depraved" aggravating circumstance, finding that Gretzler and cognate case law had narrowed the statutory phrase by "limit[ing] its application to cases which stand apart from the norm," J.A. 64, and emphasizing its insistence "that

the murder be especially cruel or especially depraved before this section would apply," J.A. 63 (emphasis in original). It thus affirmed Mr. Jeffers' death sentence.

D. Federal Habeas Corpus Proceedings

Mr. Jeffers' sought federal habeas corpus relief, alleging that Arizona's "interpretation" of the "especially heinous ... or depraved" aggravating circumstance "is unconstitutionally overbroad and vague and permits the arbitrary imposition of the death penalty." First Amended Petition, at 17. The district court rejected this contention. Jeffers v. Ricketts, 627 F. Supp. 1334, 1359-60 (D. Ariz. 1986).

In the Court of Appeals, Mr. Jeffers argued that his challenge to the "especially heinous" circumstance

encompassed three questions: Whether the words of the statute are unconstitutionally vague and overbroad on their face (citing Godfrey v. Georgia, 446 U.S. at 428-29); whether the Arizona Supreme Court had failed to "consistently define[the statute] by 'clear and objective standards' that 'provide specific and detailed guidance' that makes 'rationally reviewable the process for imposing a sentence of death'" (citing id. at 428); and whether the statute was "applied to the capital defendant ... in an overly broad manner" (citing id. at 432). Opening Brief of Appellant, at 51-52. Mr. Jeffers emphasized that he was not inviting the court to express a "'subjective opinion'" about which cases are and are not "especially heinous or depraved" but rather to determine whether Arizona's interpretation of the

circumstance "gives [a] 'principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not.' Godfrey [v. Georgia], 446 U.S. at 432." Appellant's Reply Brief, at 29.

Because the Ninth Circuit had earlier ruled that the "especially heinous" circumstance is neither void on its face (inasmuch as "'the Arizona Supreme Court need not construe the statute open-endedly'") nor void as applied in cases in which "cruelty" is found (on the ground that the victim "suffered greatly" before dying), the Court of Appeals could not accept Mr. Jeffers' argument "that the statute is void on its face." Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987) (quoting Chaney v. Lewis, 801 F.2d at 1191, 1193, 1195 (9th Cir. 1986), cert. denied, 481

U.S. 1023 (1987)). It noted, however, that "'[h]einous' and 'depraved' are inherently more difficult terms to define than is 'cruel,'" and it sustained Mr. Jeffers' "as applied" attack on the "heinous ... or depraved" part of the circumstance. 832 F.2d at 482-83. Comparing the definition of those terms that was applied in Mr. Jeffers' and in other Arizona cases, the court concluded that the "relish" and "gratuitous violence" factors to which the Arizona Supreme Court had referred in affirming his death sentence were so highly "subjective" and so lacking in "meaningful sense" that they provided no "'principled way to distinguish this case, in which the death penalty was imposed from the many cases in which it was not.'" 832 F.2d at 484-85 (quoting Godfrey v. Georgia, 446 U.S. at 433).

Judge Wilson dissented. He found that Arizona's "statutory definition" of the "heinous ... or depraved" circumstance was constitutionally sufficient and that a "'rational factfinder'" could determine that Mr. Jeffers' case fell within that definition. 832 F.2d at 487-88 (Wilson, J., dissenting) (quoting Jackson v. Virginia, 443 U.S. 307, 313 (1979)).

The State thereupon filed a Petition for Rehearing and Rehearing En Banc, for the first time raising a "question regarding the proper standard for reviewing state court findings of aggravating circumstances." Id. at 2. The panel deferred ruling on the State's request "pending further decision of this court, sitting en banc in Adamson v. Ricketts." Mar. 30, 1988 Order, at 1.

On December 22, 1988, the en banc court in Adamson concluded that the

constitutional defect that the Jeffers majority had found in Arizona's application of the "especially heinous ... or depraved" component in Mr. Jeffers' case pervaded the Arizona courts' construction of that component in Arizona death cases as a whole. Adamson v. Ricketts, 865 F.2d 1011, 1029-39 (9th Cir. 1988) (en banc). The court discerned three problems with Arizona's construction:

> First, a broad range of definitions ha[s] been provided for the terms 'heinous' ... and 'depraved,' each of which tends to employ terms or phrases as prone to subjectivity and ambiguity as those they were meant to define. Second, the Arizona courts have not restricted the creation of new definitions and factors that could constitute an (F)(6) finding. Third, even the most concrete of those definitions have been inconsistently applied.

Adamson v. Ricketts, 865 F.2d at 1031.

Following announcement of Adamson, the Jeffers' panel denied the State's

rehearing petition. Because "[t]he full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion," the court also denied rehearing en banc. Apr. 14, 1989 Order, at 1.

SUMMARY OF ARGUMENT

The Court's Eighth Amendment decisions dictate the outcome of this case. Since Furman v. Georgia, 408 U.S. 238 (1972), the Court has insisted that narrowing capital-sentencing discretion "is a fundamental constitutional requirement," Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988), that in States like Arizona, which use aggravating circumstances to serve the narrowing function, mandates that each circumstance "provide a '"meaningful basis for distinguishing the

few cases in which [the death penalty] is imposed from the many cases in which it is not."'" Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (citations omitted).

Petitioner argues that a State (as did Arizona here) may rely on an undelimited determination that a killing is "especially heinous ... or depraved" to serve that constitutional narrowing requirement, and that the federal courts must confine their review of an "especially heinous ... or depraved" determination to a "rational factfinder" analysis. The effect of Arizona's arguments is to overrule Maynard v. Cartwright and Godfrey v. Georgia. For "an ordinary person could honestly believe that every justified, intentional taking of human life is 'especially heinous,'" Maynard v. Cartwright, 108 S. Ct. at 1859, hence a

"rational factfinder" test necessarily would approve every application of the "especially heinous" and cognate circumstances, including the applications the Court disapproved in Godfrey and Maynard. The law of the Eighth Amendment is otherwise.

The Constitution requires, first, that aggravating circumstances provide a "principled means ... to distinguish those murders [that receive[] the [death] penalty from those that d[o] not." Maynard v. Cartwright, 108 S. Ct. at 1858. On their faces, the words "especially heinous ... or depraved" provide no such narrowing principle. Nor, as the Court of Appeals in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), concluded, following a comprehensive review of Arizona cases, is that defect cured by Arizona's

construction of the words, which authorizes sentencers to rely upon a constantly expanding pastiche of synonyms and factors, none of which, the Arizona Supreme Court has ruled, is either sufficient to require or necessary to support an "especially heinous ... or depraved" finding. As in Maynard, the construction of the circumstance runs afoul of the Constitution, because the Arizona courts, although considering numerous factors "to be relevant ... [have] 'refused to hold that any one of those factors must be present for a murder to satisfy [the] aggravating circumstance.'" Maynard v. Cartwright, 108 S. Ct. at 1857 (emphasis in original) (citation omitted).

The Eighth Amendment requires, second, that the state courts "have applied in this case a constitutional construction"

of the "especially heinous ... or depraved" circumstance. Godfrey v. Georgia, 446 U.S. 420, 432 (1980). In order to justify Mr. Jeffers' death sentence on the basis of that circumstance, the Arizona courts simply dressed up the mens and actus rea accompanying all unjustified, premeditated first degree murders in the terms "relish" and "gratuitous violence." Because those factors, and the elements of murder they adorn, "cannot be said to ... reflect[] a consciousness materially more 'depraved'" than that characterizing any first degree murder so as to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," Godfrey v. Georgia, 446 U.S. at 433, Mr. Jeffers' death sentence runs afoul of the rule of Godfrey.

The State's efforts to distract the Court from the dictates of Maynard and Godfrey with a spurious "standard of review" argument are unavailing. First, the State unavoidably concedes that the standard of review applied below properly applies to the Maynard-Adamson ground of relief, then tries to divert the Court from considering that ground on the mistaken bases that the Court of Appeals did not rely on it and that this Court accordingly cannot address it. But see Smith v. Phillips, 455 U.S. 209, 215, n.6 (1982). Second, Arizona conflates the "rational factfinder" standard of review that applies to a state court's finding under the "especially heinous ... and depraved" circumstance, insofar as it is a matter of state law, with the distinct standard of review that applies when the

circumstance is used by the State to satisfy the "constitutionally necessary narrowing function," Pulley v. Harris, 465 U.S. 37, 50 (1984). Because the latter issue is a federal constitutional issue requiring independent federal judicial consideration, and because Arizona avoids that issue only by disregarding the holdings of Godfrey and Maynard that the words "especially heinous ... or depraved," standing alone, are not constitutionally sufficient, respect for reason and precedent require rejection of the State's argument.

ARGUMENT

I. INTRODUCTION

Settled Eighth Amendment principles resolve this case. "Since Furman[v. Georgia, 408 U.S. 238 (1972)], [the Court's] cases have insisted that the

channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). In States like Arizona that rely on aggravating circumstances to accomplish this "constitutionally necessary narrowing function," Pulley v. Harris, 465 U.S. 37, 50 (1984), those circumstances, "must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 108 S. Ct. at 554 (quoting Zant

v. Stephens, 462 U.S. 862, 877 (1983)).[9] As Justice White originally described the function of an aggravating circumstance: "the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate." Gregg v. Georgia, 428 U.S.

---

[9]Tracking the Georgia model, Arizona in the wake of Furman chose not to narrow the scope of its first-degree murder provision, which encompasses a broad category of premeditated and felony homicides, and instead "act[ed] ... to narrow the class of murders subject to capital punishment by specifying [seven] statutory aggravating circumstances, one of which must be found ... to exist beyond a reasonable doubt" at the sentencing phase "before a death sentence can ever be imposed." Gregg v. Georgia, 428 U.S. 153, 196-97 (1976) (opinion of Stewart, Powell and Stevens, JJ.). See Ariz. Rev. Stat. §§ 13-703(E) and (F); Arizona v. Rumsey, 467 U.S. 203, 210 (1984). Mr. Jeffers' death sentence rests exclusively on the "heinous ... or depraved" finding. If "that ... aggravating circumstance [is] struck down, no valid statutory aggravating circumstance [would] remain[]." Barclay v. Florida, 463 U.S. 939, 969 n.16 (1983) (Stevens, J., concurring).

at 222 (White, J., concurring).[10]

A State's reliance on "statutory aggravating circumstances [to] play [this] constitutionally necessary function" entails

> the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel ... sentencing decision patterns ... with the result

---

[10] Accord, e.g., Lowenfield v. Phelps, 108 S. Ct. at 554; McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., concurring). What sometimes is denominated here simply as the "narrowing function" is actually two requirements: The circumstance must "circumscribe the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. at 878, so that it encompasses something less than "every unjustified, intentional taking of life," Maynard v. Cartwright, 108 S. Ct. at 1859; and the circumstance must achieve that winnowing by means of some "objective, evenhanded and substantively rational" principle, "rather than [by means of] 'caprice ... emotion'" or discrimination, Zant v. Stephens, 462 U.S. at 879; Godfrey v. Georgia, 446 U.S. at 433 (quoting Gardner v. Florida, 430 U.S. 349, 350 (1978) (plurality opinion)). See California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring).

> that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur."

Zant v. Stephens, 462 U.S. at 876-77 (quoting Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976) (opinion of Stewart, Powell and Stevens, JJ.)). Each aggravating circumstance "must, in short, provide a '"meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."'" Godfrey v. Georgia, 446 U.S. at 427 (quoting Gregg v. Georgia, 428 U.S. at 188 (opinion of Stewart, Powell and Stevens, JJ.) (quoting Furman v. Georgia, 408 U.S. at 313 (White, J., concurring))).

As did the dissenting judge below, Arizona argues here that a State may rely on an undelimited determination that a killing is "especially heinous ... or

depraved" to serve the constitutionally necessary narrowing function, and that then the federal courts must restrict their review of the "especially heinous ... or depraved" determination to the rational factfinder" standard of Jackson v. Virginia, 443 U.S. 307, 313 (1979). See 832 F.2d at 488 (Wilson, J., dissenting); Petitioner's Brief, at 11-13. We will detail subsequently the specific errors in these arguments; for now, we note only that their joint effect is to overrule Maynard v. Cartwright and Godfrey v. Georgia. For, as those cases recognize, "an ordinary person could honestly believe that every unjustified, intentional taking of life is 'especially heinous,'" Maynard v. Cartwright, 108 S. Ct. at 1858, 1859; see Godfrey v. Georgia, 446 U.S. at 428-29 ("A person of ordinary sensibility could fairly

characterize every murder as 'outrageously or wantonly vile, horrible and inhuman'"); Gregg v. Georgia, 428 U.S. at 201 (opinion of Stewart, Powell and Stevens, JJ.) ("It is, of course, arguable that any murder involves depravity of mind"); and accordingly, under Jackson v. Virginia's "rational factfinder" test, a state-court application of the "especially heinous ... or depraved" circumstance could never be found federally unconstitutional.

The law of the Eighth Amendment is otherwise. To satisfy the Eighth Amendment, there must be a "'"meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."'" Godfrey v. Georgia, 446 U.S. at 427 (quoting Gregg v. Georgia, 428 U.S. at 188 (opinion of Stewart, Powell and

Stevens, JJ.) (quoting Furman v. Georgia, 408 U.S. at 313 (White, J., concurring))).

The application of this command to a particular case requires a federal court to answer two questions relating to a State's use of the "especially heinous ... or depraved" circumstance. First, does the construction of the circumstance that the state courts employ in culling death from life cases provide a "principled means ... to distinguish those that receive[] the death penalty from those that d[o] not?" Maynard v. Cartwright, 108 S. Ct. at 1858.[11] Second, if so, "whether in light of the facts and circumstances of the murder[] that [the defendant] was convicted of

[11] Accord Adamson v. Ricketts, 865 F.2d 1011, 1029-30 (9th Cir. 1988) (en banc); Cartwright v. Maynard, 822 F.2d 1477, 1485 (10th Cir. 1987) (en banc), aff'd, 108 S. Ct. 1853 (1988).

committing, the [state courts] can be said to have applied in this case a constitutional construction ... ?" Godfrey v. Georgia, 446 U.S. at 432.[12]

We show in Parts in II(A) and (B) below that Maynard and Godfrey, respectively, invalidate Mr. Jeffers' death sentence under these analyses. In Part III we deal with the State's attempt to obscure these conclusions by an incomplete and inapposite "standard of review" analysis.

[12] Accord Barclay v. Florida, 463 U.S. 939, 948 n.5 (1983) (plurality opinion); Newlon v. Armontrout, 885 F.2d 1328, 1333-35 (8th Cir. 1989); Proffitt v. Wainwright, 685 F.2d 1227, 1262-65 (11th Cir. 1982).

II. MAYNARD AND GODFREY DICTATE THE COURT OF APPEALS' CONCLUSION THAT THE ARIZONA "ESPECIALLY HEINOUS ... OR DEPRAVED" CIRCUMSTANCE FAILED TO SERVE ITS CONSTITUTIONAL NARROWING FUNCTION

A. The Arizona Supreme Court's Construction of the "Especially Heinous ... or Depraved" Circumstance Runs Afoul of the Eighth Amendment Rule of Maynard

In Maynard v. Cartwright, the Court upheld a ruling of the United Stat Court of Appeals for the Tenth Circuit "that the words 'heinous,' 'atrocious,' and 'cruel'" in Oklahoma's capital-sentencing statute "d[o] not on their face offer sufficient guidance to the [sentencer] to escape the strictures of [the] judgment in Furman" and "that the Oklahoma [courts'] construction of the aggravating circumstance was 'unconstitutionally vague:'"

> [The Tenth Circuit's] reading of the [state] cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had "refused to hold that any one of those factors must be present for a murder to satisfy this aggravating circumstance." Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance.

Maynard v. Cartwright, 108 S. Ct. at 1857 (quoting Cartwright v. Maynard, 822 F.2d 1477, 1483, 1492 (10th Cir. 1987) (en banc) (emphasis in original)). Because the Tenth Circuit had "with some care, reviewed the evolution in the interpretation of the 'especially heinous, atrocious, or cruel' aggravating circumstance by the Oklahoma Court of Criminal Appeals," and because this Court "normally defer[s] to Courts of Appeals in their interpretation of state law," the Court saw "no reason not to accept the Court of Appeals' statements about

state law in this case." Maynard v. Cartwright, 108 S. Ct. at 1857. Testing this body of state law under Godfrey and Furman, the Court agreed with the Tenth Circuit that it was deficient.

The present case is indistinguishable from Maynard. In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) -- following which the panel below denied the State's rehearing petition in Mr. Jeffers' case -- the en banc Court of Appeals for the Ninth Circuit, without dissent on this point,[13] concluded after a comprehensive analysis of all the Arizona cases that Arizona's construction of the words "heinous" and "depraved" does not satisfy Furman's limiting and

[13]Four members of the en banc court dissented from the majority's similar conclusion in regard to the Arizona courts' application of the "cruel" component of the (F)(6) aggravating circumstance. See Adamson v. Ricketts, 865 F.2d at 1055-58 (Brunetti, J., concurring and dissenting).

channeling requirement and has produced unconstitutionally random and inconsistent results. Id. at 1031-38. Like the en banc Tenth Circuit in Cartwright, the en banc court in Adamson found that words as vague as "especially heinous ... or depraved" are not constitutionally salvaged by a definitional strategy that enumerates numerous factors which may be relied upon, but does not "state[] what specific factors are necessary" or "include any instructions to limit future review to the enumerated factors." Id. at 1033.

Given the nearly point-for-point identity of Oklahoma's pre-Cartwright construction of that State's "especially heinous" aggravating circumstance -- as described in the Tenth Circuit's decision in Cartwright -- and Arizona's construction of its analogous provision --

as described in painstaking detail in Adamson -- the Court's affirmance in the former case dictates a like result here.[14]

---

[14]Arizona contends that the court below did not premise its decision on the Maynard-Adamson ground for relief and that the ground is not before this Court because Mr. Jeffers, although he won all the relief that he sought below with regard to the "especially heinous ... or depraved" circumstance, did not cross-petition for certiorari. See Petitioner's Brief, at 7 & n.2. But see R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 382 (6th ed. 1986) (citing decisions) (certiorari does not lie to review decisions in which the petitioning party prevailed). The State is in error.

First, Arizona is mistaken about the nature of the attack on the "especially heinous" circumstance that the opinion below rejected. Contrary to the State's assertion in its question presented, the court below nowhere "determined that a state court has adopted a constitutionally narrow definition of [the "especially heinous"] aggravating circumstance," but only that a state court could do so were it so minded. Thus, just as this Court did in Gregg v. Georgia, 428 U.S. at 201-02, and Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) -- without in any way foreclosing the later decisions in Godfrey and Maynard -- the panel below simply ruled that it would not strike down the statute on its face without first examining whether the Arizona courts' application of the statute cured its facial infirmities. See 832 F.2d at 482-83. The court below accordingly foreclosed no part of

As Maynard observes, words like "heinous" and "depraved" "d[o] not on their face offer sufficient guidance to the jury to escape the strictures of our judgment in Furman v. Georgia." Maynard v. Cartwright, 108 S. Ct. at 1859. See also Newlon v. Armontrout, 885 F.2d

---

Mr. Jeffers' challenge to the Arizona courts' application of the circumstance -- to the contrary, the court granted him relief on that challenge -- and no part of that challenge is foreclosed here, even under the State's curious theory that this Court may not consider arguments that the court below rejected.

Second, by holding the State's rehearing and rehearing en banc requests pending its decision in Adamson, and then denying them, the Court of Appeals did consider the Adamson analysis as the basis for its final judgment granting Mr. Jeffers relief.

Finally, regardless of the ground on which the Court of Appeals ruled, "[r]espondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982). Accord, e.g., Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 n.7 (1985); Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1978); United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977); R. Stern, E. Gressman & S. Shapiro, supra at 382.

1328, 1334 (8th Cir. 1989) ("Absent a clear limiting directive ... words [such as] 'depravity of mind' ... are not capable of objective determination").

Construction is accordingly necessary. And in Arizona a certain manner of construction has been tried. But that construction, based on the oft-emphasized disjunctive strategy of the "especially heinous ... or depraved" clause itself, is "so broad that it ... vitiate[s] the role of the aggravating circumstance in guiding sentencing ... discretion." McCleskey v. Kemp, 481 U.S. 279, 305 (1987).[15]

As did the Oklahoma Court of Criminal

---

[15]Emphasizing the disjunctive nature of the statute are, e.g., State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988); State v. Wallace, 151 Ariz. 362, 366, 728 P.2d 232, 236-37 (1986); State v. Libberton, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984); State v. Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (1983).

Appeals' decisions under review in Maynard, (see Cartwright v. Maynard, 822 F.2d at 1487), the Arizona Supreme Court's decisions began the process of interpreting the "especially heinous" circumstance by quoting the Florida gloss on an "especially heinous" aggravating circumstance that this Court had found sufficient in Proffitt v. Florida, 428 U.S. 242, 256 (1976). As recited by the Arizona Supreme Court, that gloss provides that

> " .... heinous means extremely wicked or shockingly evil; ... [and] that atrocious means outrageously wicked and vile .... What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

State v. Watson, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978). Tracking the

Florida Supreme Court's quotation of Webster's definitions of "heinous" and "atrocious," the Arizona Supreme Court next -- in what remains its most frequently cited construction of the terms[16] -- recited Webster's definitions of "heinous" and "depraved:"

> The words 'heinous ... or depraved' have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> heinous: hatefully or shockingly evil: grossly bad.
>
> ....
>
> depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977).

As eventually came to be the case in Oklahoma, however, Arizona's interpreta-

[16] See Appendix B, Tables B-1 (col. 5) and B-3.

tion did not follow the Florida approach of reading all parts of its definition conjunctively and in pari materia with the phrase "unnecessarily torturous to the victim."[17] Neither torture nor any other concrete set of facts was required by the case law to support a finding of heinousness or depravity. Rather, Arizona sentencers frequently have been upheld in finding the "especially heinous ... or depraved" circumstance to be present, notwithstanding the absence of any pain or torture to the victim, if they deem an offense to be, for example,

[17] See Proffitt v. Florida, 428 U.S. at 255 (discussing State v. Dixon, 283 So.2d at 9) (Florida construction approved because of its objective "unnecessarily torturous" requirement); Cartwright v. Maynard, 822 F.2d at 1487. See also Godfrey v. Georgia, 446 U.S. at 431 (Georgia's definition, the abandonment of which in that case led to the Court's reversal, required "that the word, 'torture,' must be constructed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death").

(1) "marked by debasement,"[18] "hatefully" or "shockingly evil,"[19] or "grossly bad;"[20] (2) "conscienceless or pitiless;"[21] (3) "unnecessary;"[22] (4)

---

[18]E.g., State v. Fulminante, 778 P.2d 602, 610 (Ariz. 1988); State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981); State v. Ceja, 126 Ariz. 35, 40, 612 P.2d 491, 496 (1980). See also, e.g., State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988) ("marked by corruption"); State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052 (1980) ("marked by perversion").

[19]E.g., State v. Fulminante, 778 P.2d 602, 620, 621 (1988); State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 525 (1988); State v. Carriger, 143 Ariz. 142, 150, 692 P.2d 991, 1009 (1984); State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28 (1983); State v. Ricky Tison, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981); State v. Ceja, 126 Ariz. 35, 39-40, 612 P.2d 491, 496 (1980).

[20]State v. James, 141 P.2d 141, 147, 685 P.2d 1293, 1299 (1984).

[21]E.g., State v. B. Smith, 146 Ariz. 491, 505, 707 P.2d 289, 301 (1985); State v. Lujan, 124 Ariz. 365, 392, 604 P.2d 629, 636 (1979).

[22]E.g., State v. Martinez-Villareal, 145 Ariz. 441, 461, 702 P.2d 670, 690 (1985). See e.g., State v. Harding, 141 Ariz. 492, 501, 687 P.2d 1247, 1256 (1984) ("senseless").

"especially,"[23] or "particularly"[24] "heinous ... or depraved" or "more heinous ... or depraved than usual;"[25] or (5) -- in the Arizona Supreme Court's second most frequently cited formulation -- if the courts conclude that the crime is characterized by any "additional"[26] acts or circumstances beyond the bare elements of first-degree murder that place the offense "above the norm of

---

[23]E.g., State v. Johnson, 147 Ariz. 395, 401, 710 P.2d 1050, 1056 (1985); State v. Lujan, 124 Ariz. 365, 373, 604 P.2d 629, 637 (1979).

[24]State v. Wallace, 160 Ariz. 424, 428, 773 P.2d 483, 487 (1989).

[25]State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985).

[26]E.g., State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986); State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985); State v. Ceja, 115 Ariz. 413, 416, 565 P.2d 1274, 1277 (1977).

first degree ... murders."[27] Yet,

[27] State v. Beaty, 158 P.2d 232, 247, 762 P.2d 519, 534 (1988); State v. Correll, 148 Ariz. 468, 485, 715 P.2d 721, 738 (1986). Accord, e.g., State v. Harding, 137 Ariz. 278, 295, 670 P.2d 383, 400 (1983) ("apart from the usual or norm"); State v. Richmond, 136 Ariz. 312, 314, 666 P.2d 57, 64 (1983) ("'apart from the normal first degree murder'"); State v. Jeffers, 135 Ariz. at 430, 661 P.2d at 1131 ("cases which stand apart from the norm"); State v. Ortiz, 131 Ariz. 195, 210, 639 P.2d 1020, 1035 (1982) ("more heinous and depraved than the norm of first degree murders"); other decisions collected in Appendix B, Table B-1 (col. 6). Compare Eddings v. State, 616 P.2d 1159, 1167 (Okla. Cr. App. 1980), rev'd on other grounds, 455 U.S. 104 (1982) (quoted in Cartwright v. Maynard, 822 F.2d at 1487) ("the Legislature . . . intended to reach killings which are 'out of the ordinary'"). Arizona decisions, in addition to Jeffers itself, in which the court disjoined torture, or "cruelty," from the rest of the (F)(6) provision and found the (F)(6) factor present notwithstanding a finding that the victim did not suffer physically or mentally include, e.g., the Wallace, Richmond, Woratzeck, Zaragoza, Ortiz, and Ceja cases cited supra notes 18, 19, 24, 26 and above. Compare Godfrey v. Georgia, 446 U.S. at 454 (White, J., dissenting) (noting that the Georgia Supreme Court "expressly rejected an analysis that would apply the ["outrageously vile" and "torture and aggravated battery" portions of Georgia's] provision disjunctively, ... an analysis that, if adopted, would arguably be assailable on constitutional grounds"). Appendix B, Table B-1 (col 4) illustrates the catch-all nature of the "heinous ... or depraved" components of the (F)(6) aggravating circumstance once those

although the Arizona Supreme Court from time to time relies on each of these concepts as the basis for a "heinous ... or depraved" finding and a death sentence, it has never ruled that any one of them defines a condition or action that must be present to justify an "especially heinous ... or depraved" finding.

Indeed, State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983), rules precisely to the contrary. There, the Arizona Supreme Court "summar[ized] ... the law which

components are unlinked from cruelty, or torture. For although no Arizona trial court ever, and the Arizona high court only once, has found "cruelty" present when "heinousness" and/or "depravity" was not found, those courts frequently base death sentences on "heinous and/or depraved" findings when "cruelty" is not present. It is manifest, therefore, that the "mental or physical" pain meaning of "cruel" in Arizona lies at the "core" of all three components of the (F)(6) circumstance, but that Arizona's interpretation of the "heinous" and "depraved" components encompasses much else besides.

has been developing in th[is] area" and formalized the multi-factor approach described above. 135 Ariz. at 51, 659 P.2d at 9. The Gretzler court reiterated Webster's "definitions of the words heinous ... or depraved," emphasized the disjunctive nature of (F)(6)'s three components, acknowledged that numerous "factors" previously had led the Court "to a finding of heinousness or depravity" in the past, and listed five such factors -- the "apparent relishing" of murder, "gratuitous violence," "needless mutilation of the victim," "the senselessness of the crime," and the "helplessness of the victim." 135 Ariz. at 52-53, 659 P.2d at 10-11. But the court made plain that no one of the five factors nor any other factor was sufficient in itself to require a heinousness or depravity finding or

necessary in itself to support one. Those factors, the court insisted, "in isolation, need not always lead to a holding that the crime is heinous or depraved;" and, on the other hand, such a finding may be made in the absence of any of the factors, as long as other "circumstances such as the specific factors discussed above [are present and serve to] separate the crime from the 'norm' of first degree murders ...." 135 Ariz. at 53, 659 P.2d at 12 (emphasis added).

If any single "standard" emerges from Gretzler, it is this last-mentioned formula with which the court both began and ended its discussion. As the court concluded, reprising its many prior and foreshadowing its many subsequent repetitions of the formulation: "'First degree murder is by its nature willful,

cruel and repugnant.'" Hence, to qualify as "especially heinous ... or depraved," "'the facts of th[e] case [must] set it "apart from the norm of first degree murders."'" Id. (quoting State v. Steelman, 126 Ariz. 19, 26, 612 P.2d 475, 482 (1980) (quoting State v. Brookover, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979))).

Or, as the formula subsequently has been expressed:

> All first degree murders are to some extent heinous, cruel or depraved: therefore, to warrant the imposition of the death penalty, a murder must be more heinous ... or depraved than usual .... [T]o uphold this aggravating circumstance, we must find that defendant murdered ... in a manner that not only was heinous, cruel or depraved, but that was especially so.[28]

---

[28] State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985) (emphasis in original). Accord, e.g., State v. Wallace, 160 Ariz. 424, 428, 773 P.2d 983, 987 (1989) (the murder must be "particularly disturbing"); State v. Vickers, 159 Ariz. 532, 546, 768 P.2d 1177, 1191 (1989); State v. Jeffers, 135 Ariz. at 430, 661 P.2d at 1131.

The constitutional defect in this approach is the same one that led to the result in Maynard. For Arizona's, like Oklahoma's, reliance on the "contention that the addition of the word 'especially'" -- or 'abnormally' or 'unusually' --

> somehow guides the [sentencer's] discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the ... murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every

---

The continued currency of the "above the norm" and allied formulations is revealed by the frequency with which the Arizona Supreme Court in post-Gretzler decisions has affirmed "heinous or depraved" findings on this basis without citing Gretzler or even any of its factors. E.g., State v. Williams, 1987 W.L. 878 (Ariz. Oct. 8, 1987); State v. Moorman, 154 Ariz. 578, 587, 744 P.2d 679, 688 (1987); State v. Graham, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983); State v. Zaragoza, 135, Ariz. 63, 70, 659 P.2d 22, 29 (1983). See also, e.g., State v. Poland, 144 Ariz. 388, 405, 698 P.2d 183, 200 (1985) (relying on dictionary definitions but not Gretzler). See generally Appendix B, Tables B-1 (cols. 5-7) and B-3.

unjustified, intentional taking of human life is "especially heinous."

Maynard v. Cartwright, 108 S. Ct. at 1859. Accord Proffitt v. Wainwright, 685 F.2d 1227, 1264-65 n.57 (11th Cir. 1982) ("heinousness" standard is unconstitutional if it requires that the crime "be in some respect worse than others on average" but "fail[s] to indicate in what way the crime should be 'worse'").

The en banc Court of Appeals in Adamson noted three characteristics of the Arizona case law. Each is illustrated briefly below.

> First, a broad range of definitions ha[s] been provided for the terms "heinous" and ... "depraved," each of which tends to employ terms or phrases as prone to subjectivity and ambiguity as those they were meant to define. Second, the Arizona courts have not restricted the creation of new definitions and factors that could constitute an (F)(6) finding. Third, even the most concrete of those definitions have been inconsistently applied.

Adamson v. Ricketts, 865 F.2d at 1031.

Standing alone, there is nothing in Arizona's dictionary definitions -- for example, "shockingly evil" or "marked by corruption" -- or in the factors with which Gretzler illustratively supplemented those definitions: for example, "senselessness," "gratuitous violence," "relish," and "vile state of mind at the time of the murder"[29] -- that provides "any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously ... vile ....'" Godfrey v. Georgia, 446 U.S. at 428-29. See Proffitt v. Wainwright, 685 F.2d at 1264-65 n.57. Likewise,

---

[29] See, e.g., State v. LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 579 (1987); State v. McCall, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983).

every unjustified murder is by that fact alone "gratuitous" and never "sensible;" and no murderer who deliberated on the deed long enough to establish premeditation can ever be absolved of having relished the premeditated act.[30]

"Although oft-repeated" therefore, the Arizona Supreme Court's "list of amorphous terms and [its] definitional distinction[s] have failed to benefit the trier of fact in any meaningful way." Adamson v. Ricketts, 865 F.2d at 1032. "'Vague terms do not suddenly become clear when they are defined by reference to other vague terms.'" Id. at 1032 (quoting Cartwright v. Maynard, 822 F.2d

---

[30]In this last regard, recall Robert Franklin Godfrey's remark upon being arrested for killing his wife and mother-in-law: "I have been thinking about it for eight years. ... I'd do it again," Godfrey v. Georgia, 446 U.S. at 426, and William Thomas Cartwright's avowal "to 'get even' with the Riddles," Cartwright v. Maynard, 822 F.2d at 1488.

at 1489). Nor do they "narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. at 878.

Even were the synonyms and illustrative factors definitionally sufficient standing alone, these phrases do not stand alone; and they often are stood in for by an ever-expanding host of alternative and supplemental synonyms and factors. The Arizona Supreme Court repeatedly has confirmed that, although the factors listed in Gretzler "may lead to a finding of heinous or depraved," State v. Wallace, 151 Ariz. 362, 367, 728 P.2d 232, 237-38 (1986) (emphasis added), they as easily may not. In case after case, they have not led to such a

finding.[31] Moreover, the Arizona Supreme

[31] In the following first-degree murder decisions, among many others, "heinous and depraved" findings were either reversed or not made, although the Arizona Supreme Court expressly found the highlighted Gretzler factor present:

GRATUITOUS VIOLENCE. E.g., State v. Carr, 154 Ariz. 468, 469, 743 P.2d 1386, 1387 (1987) (defendant killed victim with stab wound to neck, then stabbed victim repeatedly in the back, including one 15" gash; trial court found that offense was not "heinous and depraved;" Mr. Jeffers has lodged the unpublished sentencing order in this case with the Court); State v. R.D. Smith, 138 Ariz. 79, 84-86, 673 P.2d 17, 22-24) (1983) (defendant strangled rape victim, held her down while codefendant stabbed her, then crushed victim with rocks; "heinous and depraved" finding reversed); State v. Richmond, 136 Ariz. 312, 315, 319, 666 P.2d 57, 60, 64 (1983) (defendant beat robbery victim unconscious with fists, then dropped "large rocks" on him, then drove a car over the "helpless[]" victim's head and a second time over his body, crushing both; "heinous and depraved" finding reversed by majority of concurring justices); State v. Blazak, 131 Ariz. 598, 600, 643 P.2d 694, 700 (1983) (defendant shot bartender four times at close range during a robbery, then shot two nearby patrons, killing one; "heinous and depraved" finding reversed); State v. Arnett, 125 Ariz. 201, 202, 608 P.2d 778, 779 (1980) (defendant shot victim four times with an M-1 carbine, "any one of which [shots] could have been fatal in itself;" "heinous and depraved" not found); State v. Watson, 120 Ariz. at 447-48, 586 P.2d at 1259-60 (defendant shot victim four times, the fourth while victim was lying on ground face down;

"heinous and depraved" finding reversed). See generally decisions surveyed in Adamson v. Ricketts, 865 F.2d at 1038; Jeffers v. Ricketts, 832 F.2d at 485.

RELISHING THE KILLING: E.g., State v. Rockwell, 161 Ariz. 5, 8 & n.2, 775 P.2d 1069, 1072 & n.2, 1076 (1989) (after marching robbery victim to filling station rest room at gunpoint and making helpless victim kneel in front of the toilet before being shot "execution-style," defendant "boasted" and "bragged" to friends about the killing in order to "project[] a macho image;" "heinous and depraved" not found by trial court); State v. Graham, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983) ("to impress" his friends, defendant described how the robbery victim "'squealed like a rabbit;'" "heinous and depraved" finding reversed) [compare to Rockwell and Graham: State v. Martinez-Villareal, 145 Ariz. 441, 450-51 & n.3, 702 P.2d 670, 679-80 & n.3 (1985) ("heinous and depraved" finding affirmed because, after killing the robbery victim, defendant told a friend that the act proved his "manliness" and "machismo;" statement relied upon to uphold "heinous and depraved" finding)]; State v. R.L. Smith, 141 Ariz. 510, 511-12, 687 P.2d 1265, 1266-67 (1984) (defendant "senseless[ly]" killed robbery victim who "offered no resistance [and] ... backed away" when defendant cocked trigger; afterward, "Smith laughed and joked about the murder;" "heinous and depraved" finding reversed) [compare to R.L. Smith: State v. James, 141 Ariz. 141, 147, 685 P.2d 1293, 1299 (1984) ("heinous and depraved" finding affirmed because defendant laughed and joked about robbery-murder afterwards)]; State v. R.D. Smith, 138 Ariz. 79, 85-86, 673 P.2d 17, 23-24 (1983) (facts also included in codefendant's

case, State v. Lambright, 138 Ariz. 63, 66-67, 673 P.2d 1, 4-5 (1983)) (after admittedly raping a kidnap victim "repeatedly," strangling her, holding her down while a codefendant stabbed her, then crushing victim's head with rocks, defendant "participate[d] in the macabre celebration of the killing during which the group played the song 'We Are the Champions;'" "heinous and depraved" finding reversed); State v. Madsen, 125 Ariz. 346, 352-52, 609 P.2d 1046, 1052-53 (1980) (after killing his wife and collecting the insurance money, defendant told a friend envious of his wealth, "It's easy to get money, you just blow someone away and collect the insurance;" "heinous and depraved" finding reversed).

NEEDLESS MUTILATION: E.g., State v. Cruz-Mata, 138 Ariz. 370, 371-72, 674 P.2d 1368, 1369-70 (1983), and State v. Montes, 136 Ariz. 491, 492-93, 498, 667 P.2d 191, 192-93, 198 (1983) (Cruz-Mata, Montes and third defendant (Sapien) forced victim, who had offered the three a ride, off the road, robbed him, bound him, stabbed him 29 times, and cut off his genitals; "heinous and depraved" not found in any of three cases; sentencing orders and presentence reports in three cases lodged with Court).

HELPLESSNESS: E.g., State v. B. Smith, 146, Ariz. 491, 503-09, 707 P.2d 289, 301-02 (1985) (robbery victim "helpless" when killed; "heinous and depraved" finding reversed); State v. Poland, 144 Ariz. 388, 393, 698 P.2d 183, 188 (1985) (unconscious victims sealed in canvas sacks weighted with rocks and thrown into Lake Mead to drown; "heinous and depraved" finding reversed); State v. Brookover, 124 Ariz. at 39, 601 P.2d at 1323 (defendant shot robbery victim once; then while victim was on floor asking for mercy, defendant said "don't worry, buddy, it'll be over

Court has insisted that there are "[n]umerous factors [that] can be considered in making a finding of depravity [which] include" the Gretzler factors, but also include many other factors bounded only by the requirement that they be "such things as" the Gretzler factors, or that they "in some other way ... set [the defendant] apart from the 'norm' of first degree murderers," or that they likewise

soon," and shot victim a second time; "heinous and depraved" finding reversed).

SENSELESSNESS OF THE KILLING: E.g., State v. Johnson, 147 Ariz. 395, 397, 401, 710 P.2d 1050, 1052, 1056 (1985) (defendant admitted he had no reason to kill victim, who had put him and a friend up in her home for two weeks, other than that he felt like killing someone; "heinous and depraved" finding reversed); State v. R.L. Smith, supra ("senselessness" found; "heinous and depraved" finding reversed); State v. Richmond, supra (same); State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979) (same).

establish "additional aggravation."[32]

As the en banc Court of Appeals found,

[32] State v. Villafuerte, 142 Ariz. 323, 331, 690 P.2d 42, 50 (1984); State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1984); State v. Johnson, 147 Ariz. 395, 401, 710 P.2d 1050, 1056 (1985); State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 285, 301 (1985). Accord, e.g., State v. Fulminante, 778 P.2d 602, 619, 620-21 (1988) (in addition to dictionary definitions and Gretzler factors, the court "has also" relied on other factors, including a number listed here); State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986) ("In addition to the five factors presented in Gretzler, we have also found that depravity is indicated" by two additional factors discussed here, including the factor that the offense reveals "a total disregard for human life"); State v. Gillies, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984) ("The trial court found two factors indicative of heinous and depraved: 1) the senselessness of the murder [a Gretzler factor] and 2) the savage manner of death [not a Gretzler factor]. We agree with both these findings ... [and] believe elimination of witnesses, as a motive for murder [not a Gretzler factor], also illustrates heinousness and depravity"); State v. James, 141 Ariz. 141, 147, 685 P.2d 1293, 1299 (1984) (Gretzler factors are "among others" considered); State v. McCall, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983) ("[s]everal sorts of actions" support a "finding of depraved or heinous"); State v. Gretzler, 135 Ariz. at 51, 659 P.2d at 10 (authorizing consideration of "'additional circumstances of the nature enumerated [that] set the crime apart from the usual or the norm'" (emphasis added; citation omitted)).

without dissent, what counts in Arizona is not the presence of any one of the Gretzler factors, but rather that there be "something" -- apparently anything -- "about the murder that sets it apart from the norm." State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28 (1983). Some things will do as well. For often in Arizona it is under "the totality of the circumstances [that] the finding of depravity ... [is] sustained." State v. Villafuerte, 142 Ariz. 323, 331, 690 P.2d 42, 50 (1984).[33]

[33] The court, for example, has premised "heinous and depraved" findings on "the totality of the circumstances of [the] killings," State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980), "the entire nature of the attack," State v. Roscoe, 145 Ariz. 212, 226, 700 P.2d 1312, 1326 (1985), "society's view of the murder as compared to other murders," State v. Ortiz, 131 Ariz. 195, 204, 639 P.2d 1020, 1031 (1982), "the facts of th[e] case [that] set it 'apart from the norm[].'" State v. Gretzler, 135 Ariz. at 53, 659 P.2d at 12, and any other group of "'circumstances'" that the court finds "'so shocking or repugnant that the murder stands

Under Gretzler's open-ended authorization to identify new factors as each new case comes along and to apply the new factors retroactively in that case, cf. Teague v. Lane, 109 S. Ct. 1060, 1069-70, 1072-75 (1989) (plurality opinion), the Arizona Supreme Court has expanded Gretzler's list of five to include, among the other factors surveyed in Appendix B that the defendant: eschewed a "less violent" means of killing (to wit, a pistol) that was "readily available," State v. Wallace, 151 Ariz. at 368, 728 P.2d at 238;[34] lay in wait, id.;[35] showed

---

out,'" State v. Gillies, 135 Ariz. 500, 515, 662 P.2d 1007, 1022 (1983) (citation omitted).

[34] Compare Godfrey v. Georgia, 446 U.S. at 433 n.16 ("it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer").

[35] But see State v. Arnett, 119 Ariz. 38, 41-42, 579 P.2d 542, 545-46 (1978) (defendant "lay in wait" for victim; "heinous and depraved"

no "compassion or remorse," State v. James, 141 Ariz. 141, 147, 685 P.2d 1293, 1299 (1984);[36] "could have accomplished whatever criminal goals he desired without killing" the victim, State v. Zaragoza, 135 Ariz. at 69, 659 P.2d at 28; eliminated witnesses to an accompanying felony, e.g., State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986);[37] killed someone who was

---

circumstance not found by trial court).

[36] But see State v. Carriger, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) ("if [defendant] chooses not to ... admit his guilt, that is irrelevant to a sentencing determination").

[37] But see State v. R.D. Smith, 138 Ariz. 79, 84-86, 673 P.2d 17, 22-24 (1983) ("the uncontradicted evidence before the judge, including Smith's own statements, established that the reason for the killing was to prevent [the victim] from pressing charges of kidnapping and rape;" "heinous and depraved" finding reversed); State v. Hensley, 142 Ariz. 598, 602, 604, 691 P.2d 698, 693, 695 (1984) (defendant shot and killed three persons present at robbery of a bar for the avowed purpose of "leaving no witnesses;" "heinous and depraved" finding reversed).

old, young, female, his mother, or had displayed "generosity and concern" for the defendant;[38] acted "totally without regard for human life" or "for the fundamental principles upon which our society is based," State v. Wallace, 160 Ariz. 424, 428, 773 P.2d 983, 987 (1989);

---

[38] State v. Zaragoza, 135 Ariz. 63, 69-70, 659 P.2d 22, 28-29 (1983) (elderly victim); State v. Roscoe, 145 Ariz. 212, 226, 700 P.2d 1312, 1326 (1984) (young victim); State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983) (female victim, neither young nor old; "heinous" finding affirmed because case otherwise resembled Zaragoza, supra and Roscoe, supra); State v. Moorman, 154 Ariz. 578, 587, 744 P.2d 679, 688 (1987) ("matricide" per se "above the norm of first-degree murder"); State v. Fisher, 141 Ariz. 227, 252, 686 P.2d 750, 775 (1984) (victim showed defendant compassion). But see State v. Schad, 129 Ariz. 557, 573-74, 633 P.2d 366, 382-83 (1981) (victim 74 years old; "heinous and depraved" not found by trial court); State v. Girdler, 138 Ariz. 482, 484, 675 P.2d 1301, 1303, (1983) (defendant burned young child to death; "heinous and depraved" not found); State v. Johnson, 147 Ariz. 395, 397, 401, 710 P.2d 1050, 1052, 1056 (1985) (defendant, admittedly for no reason other than that he felt like killing someone, shot and killed a childhood friend who had been providing him with a place to stay for weeks; "heinous and depraved" finding reversed).

State v. Martinez-Villareal, 145 Ariz. 441, 451, 702 P.2d 670, 680 (1985); and "violated the special parental relationship," State v. Fulminante, 778 P.2d 602, 621 (Ariz. 1989); and the Arizona Supreme Court also has affirmed "heinous and depraved" findings because the killing was "cold-blooded," State v. R.L. Smith, 141 Ariz. 510, 512, 687 P.2d 1265, 1267 (1984);[39] "savage," State v. Gillies, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984); "ghastly," State v. Knapp, 114 Ariz. at

---

[39] But see State v. B. Smith, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985) ("That defendant's actions may have been cold and deliberate demonstrates not heinousness or depravity but ... intent;" "heinous and depraved" finding reversed); State v. Madsen, 125 Ariz. 246, 247-48, 252, 609 P.2d 1046, 1047-48, 1052 (1980) (murder of wife with gun she had just helped him site, thinking they were engaging in target practice, followed by defendant's statement "there, that's done" and his collection of insurance money was "cold-blooded;" "heinous and depraved" finding reversed).

543, 562 P.2d at 716;[40] and "repugnant to a civilized society," State v. Beaty, 158 Ariz. 232, 243, 762 P.2d 519, 530 (1988) (citation omitted). See Adamson v. Ricketts, 865 F.2d at 1034-35 (citing numerous exemplary cases) (the "possibilities appear endless").[41] In short, although the Arizona Supreme Court has said that numerous factors "can support this aggravating circumstance, ... the court has refused to hold that any one of those factors must be present for a murder to satisfy [the] ... circumstance.

---

[40] But see State v. Richmond, 136 Ariz. 312, 323, 666 P.2d 57, 68 (1983) (Cameron, J., concurring, in opinion joined by majority of court) ("It is true that [the murder] ... was ghastly;" "heinous and depraved" finding reversed).

[41] Accord Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases, 64 N.C.L. Rev. 941, 981 (1986) (comprehensive review of Arizona's "heinous ... or depraved" cases, concluding that, "[w]henever anything about a murder has proved offensive to the [Arizona] court . . . it has approved [the] especially heinous [factor]").

The underlying position of the ... court appears to be that it can simply review the circumstances of the murder and divine whether the murder was 'especially heinous ....'" Cartwright v. Maynard, 822 F.2d at 1491 (emphasis added) (quoted in part in Maynard v. Cartwright, 108 S. Ct. at 1857).

The result of "such an open-ended construction," Gregg v. Georgia, 428 U.S. at 201, is not hard to predict: "within the plethora of factors the Arizona courts may consider there has been much contradiction and inconsistency in the application of the (F)(6) circumstance ... plainly demonstrat[ing] that the ... circumstance has been applied in an arbitrary and capricious manner in violation of the most basic principles of death penalty jurisprudence." Adamson v. Ricketts, 865 F.2d at 1037-38 (surveying

50 Arizona cases). See, e.g., decisions cited supra notes 31, 35-40 and accompanying text. As the Court of Appeals concluded in this case, based on its own comparison of Arizona cases, "Arizona's existing standard ... for murder committed in an 'especially heinous ... or depraved manner,'" has "los[t] its ability to distinguish in a principled manner between those it condemns to death and those it does not." 832 F.2d at 486. See id. at 484-85. Compare Cartwright v. Maynard, 822 F.2d at 1490.

The Court of Appeals' comprehensive analysis of the Arizona cases more than amply documents that Arizona's construction of the "heinous ... depraved" circumstance has replicated the "major systemic defects identified in Furman." Pulley v. Harris, 465 U.S. at

54. In word as well as result, that construction provides "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313 (White, J., concurring).

Because this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, [are] enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty," Maynard v. Cartwright, 108 S. Ct. at 1859, no further analysis is necessary to invalidate Mr. Jeffers' death sentence.

B. The Arizona Courts' Application of the "Heinous ... or Depraved" Aggravating Circumstance in Mr. Jeffers' Case Runs Afoul of the Eighth Amendment Rule of Godfrey

Even if the Arizona courts had maintained a constitutional construction of the "especially heinous ... or depraved" aggravating circumstance, they applied no such construction in Mr. Jeffers' case. Accordingly, his death sentence violates the constitutional rule of Godfrey v. Georgia. "[I]n light of the facts and circumstances of the murder[] that [the defendant] was convicted of committing," the state courts cannot "be said to have applied in this case a constitutional construction" of the "especially heinous ... or depraved" circumstance. Godfrey v. Georgia, 446 U.S. at 432.

The facts of Mr. Jeffers' case, like those of Godfrey, fall within no such

construction supplied by state law. As found by the state courts, those facts do show that Mr. Jeffers formed an unlawful intention, borne of years of domestic strife, voluntary substance abuse, and the victim's having informed the authorities about his illegal activities, to kill Penelope Cheney, compare Godfrey v. Georgia, 446 U.S. at 424 & n.3; and that he premeditated and carried out that intention in the full flowering of his anger, not only deliberately (though painlessly) killing Ms. Cheney, but also cursing her and hitting her "with his hands about the face four or five times" after she died. J.A. 13-14. See J.A. 18-19. Much as Mr. Godfrey told the police moments after killing his wife and mother-in-law with shotgun blasts to the head (in between which he "took out time not only to strike his daughter on the

head [with the barrel of his gun], but also to reload his single-shot shotgun"), Mr. Jeffers "committed a hideous crime" that he had thought "about ... for [some time]." Godfrey v. Georgia, 446 U.S. at 425-26; id. at 449 (White, J., dissenting). Like Mr. Godfrey, Mr. Jeffers was found guilty of "the unjustified, intentional taking of human life." Maynard v. Cartwright, 108 S. Ct. at 1859. But these facts do not "differentiate this case in an objective, evenhanded, and substantively rational way from the many ... murder cases in which the death penalty may not be imposed," Zant v. Stephens, 462 U.S. at 879.

At the time of both of Mr. Jeffers' sentencing proceedings, in the spring of 1978 and the summer of 1980, the only Arizona Supreme Court guides to the

meaning of the "especially heinous ... or depraved" circumstance were the dictionary definitions that State v. Knapp had quoted from Webster's Third New International Dictionary: "'heinous'" means "'hatefully or shockingly evil: grossly bad'" and "'depraved'" means "'marked by debasement, corruption, perversion or deterioration.'" 114 Ariz. at 543, 562 P.2d at 716. As in Godfrey, the sentencer here was instructed exclusively "in the words of the statute" and in a series of "excessively vague" and "highly subjective" synonyms. Maynard v. Cartwright, 108 S. Ct. at 1858; California v. Ramos, 463 U.S. 992, 1000 n.12 (1983); Zant v. Stephens, 462 U.S. at 878 (all discussing Godfrey). The State's submission to the trial court was -- as it has remained in every court including

this one -- simply that the "totality of the circumstances" controlled;[42] and it was those circumstances, in their totality, that the trial court gave as the only explanation of its finding that "the defendant committed the offense of first degree murder in an especially heinous, cruel and depraved manner." J.A. 13-14 (quoted supra pp. 6-7). See J.A. 60-61. Precisely as in Godfrey and

[42]Without iterating a standard, the State's presentencing submissions merely referred the sentencer to a number of circumstances of the case, such as Mr. Jeffers' initiation of the fatal acts, his injection of more heroin than "necessary to kill the victim," his "cussing" and "swearing at the body" and "verbalizations of hate" towards the victim, his "needless and senseless" actions, the victim's "resistless" condition, the "brutality exhibited in disposal and interment," Mr. Jeffers' "macabre and heinous propensities," his failure to confess, his "shockingly evil conduct," and the "evidence of a cruel and depraved mental state." July 10, 1980 T. 189; State's June 5, 1980 Resentencing Memorandum, at 2-3. See also State's Dec. 16, 1980 Answering Brief on Appeal (Resentencing Only), at 20-21 (arguing that "'totality of circumstances'" controls). See also Petitioner's Brief in this Court, at 15-17.

Maynard, therefore, there was "nothing in th[e] few words" of the statute or in "the events recited by" the trial court to constrain "the unfettered discretion of the [sentencer] and to satisfy the commands of the Eighth Amendment." Godfrey v. Georgia, 446 U.S. at 428; Maynard v. Cartwright, 108 S. Ct. at 1859.[43]

Nor was the "standardless and unchanneled imposition of [a] death sentence[] in the uncontrolled discretion of a basically uninstructed" sentencer

[43]The Arizona Supreme Court itself documented the sentencer's overbroad approach to aggravating circumstances, concluding that the trial court (1) improperly "stretch[ed] the statute to extreme length" in finding the "grave risk of death to another person" circumstance; (2) erred in finding "cruelty" although it was "not proven" because "the victim experienced no pain or mental suffering;" and (3) relied "largely" on "acts which occurred after the victim's death" and which the high court refused to endorse as proper bases for an "especially heinous" finding. J.A. 57-62.

"cured by the affirmance of th[at] sentence[] by the state Supreme Court." Godfrey v. Georgia, 446 U.S. at 429. For the Arizona Supreme Court did in microcosm in Mr. Jeffers' case what the en banc Court of Appeals in Adamson concluded has been done in macrocosm in construing and applying the "especially heinous ... or depraved" circumstance in all other post-Gretzler cases. Reviewing the totality of the circumstances in such light as was shed by the "dictionary definitions of the [statutory] words used" (J.A. 60) and asking only "that the murder be ... especially depraved" (J.A. 63) (emphasis in original), the Court affirmed the (F)(6) finding in Mr. Jeffers' case upon concluding that it could identify factors in the case that somehow "distinguished the murder[] from the 'usual or the norm' of first degree

murders." J.A. 62. See J.A. 64.

Although the Arizona Supreme Court recited a number of factors (see J.A. at 60-61), it focused on two -- the same two factors noted above by means of which the jury, sentencer, and supreme court rightfully concluded that the murder of Ms. Cheney was unjustified, premeditated, and first degree: After the victim apparently had died, Mr. Jeffers swore at her and hit her on the head with his hands four or five times, reciting the names of his associates who were arrested after Ms. Cheney spoke to the police. J.A. 61, 63. See also Jeffers v. Ricketts, 627 F. Supp. at 1342. The court dressed up those facts in the language of two of the Gretzler factors -- "relish" because Mr. Jeffers swore at the victim and verbalized his motive for killing her, and "gratuitous violence"

because of the four or five slaps. But motivation, premeditation, and deliberation is all that these factors reveal. No more than Godfrey's multiple shotgun blasts, the blow Godfrey delivered to his daughter's head with his gun, and Godfrey's statements about contemplating the killing for years and being prepared to "do it again," can Mr. Jeffers' actions "be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of [first-degree] murder," so as to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. at 433.

The aptness of Godfrey's "no principled way" conclusion as a description of what transpired in Mr. Jeffers' case is

illustrated in two ways, as the court below concluded. First, the equation in Mr. Jeffers' case of the "relish" and "gratuitous violence" factors with a defendant's verbal and physical expressions of the motivations precipitating his homicidal deliberation and action departed from any "core" meaning the two factors once may have had. Second, that equation also departs from the analysis and results in numerous first-degree murder cases in which no "heinous ... or depraved" finding was made or, if made, was reversed notwithstanding far more "relish" and post-mortem violence than Mr. Jeffers exhibited.

If any "core" principle can be discerned as giving shape to Gretzler's concept of "relish," it is a requirement of actions or verbalizations, distinct

from those constituting or revealing the actus and mens rea during the commission of the homicide itself, that manifest an after-the-fact expression of the defendant's enjoyment of killing for its own sake. State v. Gretzler, 135 Ariz. at 52, 659 P.2d at 11 (quoting State v. Clark, 126 Ariz. 428, 437, 616 P.2d 888, 897 (1980)) ("we found a depraved state of mind where defendant murdered four people and then 'kept a spent bullet as a grisly souvenir of his crime'").[44] In contrast to every other case in which

---

[44] See also State v. Rossi, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985) (defendant kept "souvenir" of crime); State v. Gerlaugh, 144 Ariz. 449, 454, 698 P.2d 694, 699 (1985) (defendant later likened the killing to "shoot[ing] game"); State v. Gillies, 142 Ariz. 564, 571, 691 P.2d 655, 661-62 (1984) (defendant later joked about the killing); State v. Lambright, 138 Ariz. 63, 67, 75, 673 P.2d 1, 5, 13 (1983) (defendant later "engaged in a macabre celebration of the killing" and kept a "memento" from it); State v. Vickers, 129 Ariz. 506, 509, 633 P.2d 315, 318 (1981) (defendant told reporter he enjoys killing).

the Arizona Supreme Court has found "relish," however, Mr. Jeffers' case exhibits no such expressions either after the homicidal acts or in reference to killing anyone besides Ms. Cheney. The "relish" concept cannot be expanded to reach Mr. Jeffers' contemporaneous expressions of the motivation that led him to commit the homicide itself without losing all capacity to differentiate his case, in which "heinousness" was found and the death penalty imposed, from the many Arizona cases in which that did not occur notwithstanding contemporaneous and even after-the-fact expressions of premeditation, motivation, and even homicidal pleasure in general going far beyond anything of which Mr. Jeffers can

be accused.[45]

---

[45] Compare, e.g., State v. Carr, 154 Ariz. 468, 469, 743 P.2d 1386, 1387 (1987) (defendant slashed victim's neck and repeatedly stabbed victim, saying as he did so, "'that will teach you;'" trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. Kinkade, 147 Ariz. 250, 252, 709 P.2d 884, 886 (1985) (defendant lured victim who owed defendant money on a gambling debt to the desert where he shot the victim three times in the back of the head, pulled the dead victim out of the car, and shot the victim a fourth time, saying, "'So, you like to gamble, huh, fucker?;'" trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. Vaughn, 147 Ariz. 28, 28-29, 708 P.2d 453, 453-54 (1985) (defendant bragged to accomplice driving getaway car as they left the scene that he forced the gas station attendant into the rest room, made him kneel, ordered him to beg for his life, then shot him execution-style; trial court found that offense was not "heinous or depraved;" sentencing order lodged with Court); State v. Madsen, 125 Ariz. 346, 347-48, 353, 609 P.2d 1046, 1048, 1053 (1980) (after defendant lured his estranged wife to desert on target-shooting pretext, he shot her, commenting, "there, that's done;" later defendant told a friend, "It's easy to get money, you just blow someone away and collect the insurance;" "heinous and depraved" finding reversed); State v. Brookover, 124 Ariz. at 39, 601 P.2d at 1323-24 (1979) (defendant shot drug dealer in other dealers' presence to convince latter he was a "heavyweight;" after firing first shot, following which the prone victim pleaded for his life, defendant said, "'don't worry, buddy, it'll be over soon'" and shot him a second

A like conclusion pertains to the "gratuitous violence" factor. If Gretzler can be said to have given that phrase any content at all, it was by referring to a "'barrage of violence'" against the victim made up of numerous shots or blows, "each of which," as the court elsewhere has required, "would have

---

time; "heinous and depraved" finding reversed). See also State v. Graham, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983) (to "impress" his friends, the smiling defendant described the victim's reaction to being shot as "'squeal[ing] like a rabbit;'" "heinous and depraved" finding reversed); State v. Rockwell, 161 Ariz. 5, 8 & n.2, 9-10, 775 P.2d 1069, 1072 & n.2, 1073-79 (1989) (defendant "boasted" and "bragged" to friends and relatives about "execution-style" robbery-killing to "project[] a macho image;" "heinous and depraved" not found by trial court); State v. R.L. Smith, 141 Ariz. 510, 511-12, 687 P.2d 1265, 1266-67 (1984) (defendant "laughed and joked about the murder" afterward; "heinous and depraved" reversed); State v. Lamb, 142 Ariz. 463, 467, 690 P.2d 764, 768 (1984) (defendant bragged to friend after bludgeoning two robbery-murder victims to death with a two-by-four, that "you can get away with murder in Phoenix;" no "heinous and depraved" finding reported). See generally decisions reviewed in Adamson v. Ricketts, 865 F.2d at 1037-38; Jeffers v. Ricketts, 832 F.2d at 484-85.

been fatal in itself."[46] Yet the facts found in this case, unlike those found in every other case in which the Arizona Supreme Court has relied upon the factor, reflect nothing like a "barrage" of potentially homicidal post-mortem violence. Nor can the "gratuitous violence" factor be enlarged, as it was in Mr. Jeffers' case, to any increment of violence beyond that medically sufficient to kill, without destroying the concept's capacity to distinguish "heinous" and

---

[46] State v. Gretzler, 135 Ariz. at 52, 659 P.2d at 11 (quoting State v. Ceja, 126 Ariz. 35, 612 P.2d 491, 493-96 (1980) and State v. Ceja, 115 Ariz. 413, 414, 565 P.2d 1274, 1277-78 (1977) (multiple potentially fatal shots to multiple victims)); State v. Fisher, 141 Ariz. 227, 252, 686 P.2d 750, 775 (1984) (emphasis added). See, e.g., State v. LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 578 (1987) (multiple stab wounds, "five [of which] would have immediately killed" the victim); State v. Gerlaugh, 144 Ariz. 449, 454, 698 P.2d 694, 699 (1985) (multiple attacks "caused several injuries, any of which would have been fatal"); State v. McCall, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983) (multiple attacks, each "potentially fatal").

"non-heinous," death and life, cases in Arizona on the basis of a recognizable principle.[47]

---

[47] Compare, e.g., State v. Carr, 154, Ariz. 468, 469, 743 P.2d 1386, 1387 (1987) (defendant killed victim with stab wound to neck, then stabbed victim repeatedly in the back, including one 15" wound; trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. Kinkade, 147 Ariz. 250, 252, 709 P.2d 884, 886 (1985) (defendant shot victim in back of head at point-blank range three times, then pulled dead victim out of the car and shot him again; trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. R.D. Smith, 138 Ariz. 79, 85-86, 673 P.2d 17, 22-24 (1983) (defendant strangled rape victim, held her while codefendant stabbed her, then crushed victim with rocks; "heinous and depraved" finding reversed); State v. Richmond, 136 Ariz. 312, 315, 319, 666 P.2d 57, 60, 64 (Ariz. 1983) (defendant beat robbery victim unconscious with fists, dropped "large rocks" on him, drove car over "helpless[]" victim's head, crushing the skull, then drove the car over the victim's body, crushing it; "heinous and depraved" finding reversed by majority of concurring justices); State v. Blazak, 131 Ariz. 598, 602, 643 P.2d 694, 700 (1983) (defendant shot bartender four times at close range during robbery then shot two nearby patrons, killing one; "heinous and depraved" finding reversed); State v. Watson, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978) (defendant shot victim four times, the last time after victim was lying face down on floor; "heinous and depraved" finding reversed); State v. Arnett, 119 Ariz. 38, 41-42,

On this record, one of three conclusions must be reached: Either the terms "relish" and "gratuitous violence" have no "core" meaning at all beyond the premeditation and unjustifiability that characterize all first degree murders; or the Arizona Supreme Court departed in Mr. Jeffers' case from whatever "'objective'" and "'rationally reviewable'" meaning one might possibly ascribe to those terms; or that the court considers those characteristics merely relevant, but not decisive for a "heinous and depraved" finding, and that it is the totality of circumstances that, subjectively,

---

48, 579 P.2d 542, 545-46, 552 (1978) (defendant lay in wait for robbery victim then shot him five times with an M-1 carbine, "any one of which [shots] could have been fatal in itself;" "heinous and depraved" not found). See generally decisions surveyed in Adamson v. Ricketts, 865 F.2d at 1037-38; Jeffers v. Ricketts, 832 F.2d at 484-85.

controls. Through whichever cause, the terms "relish" and "gratuitous violence," at least as applied in this case, lost the "ability to distinguish in a principled manner between those [whom Arizona] condemns to death and those it does not," Jeffers v. Ricketts, 832 F.2d at 486.

III. ARIZONA'S EFFORTS TO AVOID THE CLEAR DICTATES OF MAYNARD AND GODFREY BY CREATING A SPURIOUS "STANDARD OF REVIEW" ISSUE ARE UNAVAILING

The State seeks to portray this case as one that resolves into three questions: (1) Is there a state-law "rule" according to which the "especially heinous ... or depraved" circumstance is applied? (2) If so, is that "rule" constitutionally valid? (3) If so, is the instant case within that "rule?" Petitioner's Brief, at 10-12. See also Brief Amicus Curiae

of the Criminal Justice Legal Foundation, at 4-8. The State contends that question number (2) is not open to Mr. Jeffers in this Court and that question number (3) can be governed by no stricter "standard of review" than a "rational factfinder" test.

This framing of the issues is manifestly driven by the necessary concession that the State's second question -- the so-called Maynard-Adamson question -- is a pure question of federal law, which the federal courts on certiorari or habeas corpus are obliged to review de novo. Petitioner's Brief, at 7, 10-11. See also Brief Amicus Curiae of the Criminal Justice Legal Foundation, at 9-10. The State's "standard of review" argument, advanced as the sole basis for reversal of the Ninth Circuit's judgment, does not even

purport to take issue with that judgment insofar as the judgment was rendered or is sustainable under a Maynard-Adamson analysis. The unavoidability of the State's conceding this point explains its unsuccessful contortions in an effort first, to excise the Maynard-Adamson analysis from the panel opinion below, then to obscure the panel's and the en banc Court of Appeals' denial of rehearing in the light of Adamson, and finally to divert this Court from its longstanding rule permitting the prevailing party below to "defend a judgment on any ground which the law and record permit that would not expand the relief granted." United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977). Given the role that the Maynard-Adamson analysis actually played in both the original and rehearing proceedings in

Mr. Jeffers' case and the clear availability of that analysis for defending the Ninth Circuit's judgment in this Court irrespective of the exact ground of decision below, the State's inescapable concession with regard to its so-called second question provides sufficient basis for dismissal of certiorari or affirmance of the Ninth Circuit without more. See supra note 14.

In any event, Arizona only succeeds in stating its third question as one on which deference is due to the state courts by a verbal sleight of hand, namely, by using the singular "rule" to refer to what in fact is two rules, one arising under state law and the other under federal law. In Arizona, as we have shown in Part I supra, the same verbal formulation -- that is, the same

statutory aggravating circumstance -- serves both the state-law function of justifying a death sentence, and the "constitutionally necessary" federal function of "'genuinely narrow[ing] the class of persons eligible for the death penalty and ... reasonably justify[ing] the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 108 S. Ct. at 554 (quoting Zant v. Stephens, 462 U.S. at 876-77)). Once these two functions are separated, the distinctness of the standard of federal review appropriate to each becomes clear, as does the pernicious and unprecedented nature of the State's attempt to conflate the two standards. For, while it is true that a state court's "especially heinous ... or depraved" finding, insofar as it is a matter of state law, is reviewable

by the federal courts only under the "rational factfinder" rule of Jackson v. Virginia, 443 U.S. 307, 313, 324 (1979),[48] a different standard of review

[48] Jackson provides the appropriate standard of review when -- as in the cases the State cites as supposedly in conflict with the decision below -- the sole issue is whether the State has adduced sufficient evidence to convince a rational factfinder beyond a reasonable doubt of the defendant's eligibility for death under an aggravating circumstance or other statutory provision that either has "no part to play in the constitutionally required narrowing process" (Lowenfield v. Phelps, 108 S. Ct. at 555; e.g., Barclay v. Florida, 463 U.S. at 967-69 & n.16 (Stevens, J., concurring)) or has been authoritatively narrowed so as routinely to serve its federal role (e.g., Barclay v. Florida, 463 U.S. at 947-48 & nn.4, 5 (plurality opinion)). See Magwood v. Smith, 791 F.2d 1438, 1441, 1447-50 (11th Cir. 1986), cert. denied, 110 S. Ct. 291 (1989) ("clear error" test applied in reviewing state trial court's rejection of two mitigating factors, neither of them subject to constitutional challenge); Ford v. Strickland, 696 F.2d 804, 819 (11th Cir.) (en banc), cert. denied, 464 U.S. 865 (1983) (limited federal review when petitioner "contends that under Florida case law, the court should have set aside two aggravating circumstances" specified in a "properly drawn statute with appropriate standards to guide discretion" (emphasis added)). See also Godfrey v. Georgia, 446 U.S. at 451, 454-56 (White, J., dissenting) (only upon concluding that the aggravating circumstance was not "assailable on

is applicable when the "especially heinous ... or depraved" formulation is used by the State to satisfy the distinct "fundamental constitutional requirement" (Maynard v. Cartwright, 108 S. Ct. at 1858) of providing "an objective,

constitutional grounds" or "aberration[ally]" applied does opinion review the finding of that circumstance under a "rational factfinder" standard). The "rational factfinder" analysis governs most aggravating circumstance determinations, for most aggravating circumstances on their face clearly and concretely perform the constitutionally required limiting and channeling function. See Godfrey v. Georgia, 446 U.S. at 423 n.2 (distinguishing "especially heinous" cognate at issue there from all other aggravating circumstances in the Georgia statute which "are considerably more specific or objectively measurable"). Review of the sort discussed in Part II supra, accordingly is reserved for the few statutory "narrowing" devices such as Arizona's "especially heinous ... or depraved" clause that on their face are "so broad that [they] may ... vitiate[] the role of the aggravating circumstance in guiding the sentencing discretion," McCleskey v. Kemp, 481 U.S. 279, 305 (1987), and "so vague that they would fail adequately to channel ... sentencing patterns ... with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur," Gregg v. Georgia, 428 U.S. at 195 n.46 (opinion of Stewart, Powell and Stevens, JJ.).

evenhanded, and substantively rational way" of distinguishing Mr. Jeffers' case from the many first degree murder cases in Arizona in which death sentences have not been imposed. Zant v. Stephens, 462 U.S. at 879. Because the latter requirement is a federal constitutional requirement, the question of the State's compliance with it -- the Godfrey question -- is subject to the same independent federal constitutional review as the Maynard-Adamson question with regard to which the State concedes the point.

Not only in Godfrey and Maynard but in numerous analogous cases, this Court has confronted "rules" that serve dual state and federal functions and has carefully avoided letting its deference to a state court's conclusion with regard to the rule's service of a state-law function

interfere with the Court's own independent review of the rule's capacity under the facts and circumstances of the case to serve its federal constitutional function. For example, a state court's ruling that a custodial confession is "voluntary," in keeping with the various evidentiary functions that the state's voluntariness rule serves, has never led this Court to defer to that ruling in determining whether the manner in which the confession was obtained serves the functions of the similarly christened, but not always similarly conceived, voluntariness rule under the Fifth and Fourteenth Amendments. For, as the Court frequently has remarked in that context, "we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of

federal right, else federal law could be frustrated ....'" Haynes v. Washington, 373 U.S. 503, 515-16 (1963) (quoting Stein v. New York, 346 U.S. 156, 181 (1953)). "Without exception," therefore, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination. ... As early as 1978, the Court reaffirmed that it was 'not bound by' a state-court voluntariness finding and reiterated its historic 'duty to make an independent evaluation of the [issue].'" Miller v. Fenton, 474 U.S. 104, 110 (1985) (quoting Mincey v. Arizona, 437 U.S. 385, 398 (1978)).[49]

---

[49] See also Jackson v. Denno, 378 U.S. 368, 386-87 & n.13 (1964) (States are free to use juries to determine voluntariness in service of the state-law functions of the voluntariness rule, but are required initially to use judges to determine voluntariness in order to serve the rule's

Examples of this principle abound. Manifestly, what for state-law purposes may sufficiently constitute "probable

---

federal constitutional functions); Rogers v. Richmond, 365 U.S. 534, 547 (1961) (Court will not defer to historical facts found in the process of a state voluntariness determination if the function of the state-law rule differs substantially from the functions of the federal voluntariness requirement, because "[h]istorical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusion if and merely because a correct standard is later applied to them"). In this case, unlike in Rogers v. Richmond, supra, no questions of historical fact arise. Rather, the concepts that the issue presented here call upon the Court to apply -- whether "the narrowing function required for a regime of capital punishment" has been served, and whether the "heinousness" aggravating circumstance provides "'clear and objective standards,'" "'specific and detailed guidance,'" a "'rationally reviewable ... [capital sentencing] process,'" and "'a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not,'" Lowenfield v. Phelps, 108 S. Ct. at 555; Godfrey v. Georgia, 446 U.S. at 427-28 (citations omitted) -- all are manifestly legal standards that "can be given meaning" by this Court "only through its application [of those standards] to the particular circumstances of a case," hence as to which the Court's review must be plenary. Miller v. Fenton, 474 U.S. at 114.

cause" to search, seize, or arrest, "competency to stand trial," "effective legal representation," "intent to kill" sufficient to warrant imposition of the death penalty, "full and adequate" consideration of mitigating circumstances in capital sentencing, or a "comprehensible instruction" to juries on any number of guilt-innocence and sentencing-phase issues does not necessarily satisfy the purposes served by the Fourth, Eighth, and Fourteenth Amendment rules that go by the same names. Accordingly, in all those fields, and in many more besides, the Court routinely applies its own independent judgment to the question whether the facts of a case bring it within those federal constitutional "rules," notwithstanding that the cases nearly always reach the Court on a record

containing a state-court determination that the facts bring the case within a similarly denominated state-law "rule."[50]

---

[50] E.g., Penry v. Lynaugh, 109 S. Ct. 2934, 2950 (1989) (although Texas concluded that its sentencing-phase question concerning the defendant's "future dangerousness" adequately served the function of bringing mitigating factors before the sentencer for state-law purposes, this Court, on independent review, concluded that the procedure fell afoul of the Eighth Amendment function the submission and unfettered consideration of mitigating factors is required to play in capital sentencing); Mills v. Maryland, 108 S. Ct. 1860, 1867, 1870 (1988) (review of jury instruction on mitigation that state's high court had deemed sufficient to inform individual jurors that they were required to consider whatever mitigation each of them found in the case as required by state law; "[w]hile conceding that the [Maryland] Court of Appeal's construction of the jury instruction ... is plausible," hence that under a "rational basis" test affirmance would be required, Court went on to conduct independent review under the Eighth Amendment and to reverse); Tison v. Arizona, 481 U.S. 137, 155-56 n.11 (1987) ("The fact that the Arizona Supreme Court purported to find 'intent to kill' before affirming [the] death sentences" involved in the case did not bind the Supreme Court to conclude that the federal "intent to kill" threshold for capitally punishing the petitioners had been crossed; upon independent review, the Court concluded that Arizona's "intent" rule does not serve the function that federal law requires of its similarly worded minimum-culpability rule and

remanded for further proceedings under the federal rule); Cabana v. Bullock, 474 U.S. 376, 385 n.3, 387, 390 (1986) (similarly independent review of alternative federal-law threshold for capital sentencing that the defendant "actually killed," notwithstanding state-law determination under Mississippi's accessorial liability rules that the defendant "by legal definition [had] actually killed;'" for "there is a class of persons whom the State may define as having committed capital murder but whom [the Eighth Amendment provides] the State may not permissibly execute" (emphasis in original; citation omitted); Francis v. Franklin, 471 U.S. 307, 315-16 (1985) (in reviewing jury instruction that state courts had deemed sufficient to inform the jurors in regard to the prosecution's burden of proof, Court held that "[t]he question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what [the Court itself concludes that] a reasonable juror could have understood the charge as meaning"); Cuyler v. Sullivan, 446 U.S. 335, 341-43 (1980) (review of whether facts of case reflected "effectiveness of counsel" was independent notwithstanding state courts' satisfaction on the issue); Drope v. Missouri, 420 U.S. 162, 175 (1975) (quoting Norris v. Alabama, 326 U.S. 271, 276 (1945)) (notwithstanding state court determination that defendant was competent to stand trial, Court concluded that "it is 'incumbent upon'" it to review the defendant's competency independently "'in order that the appropriate enforcement of the federal right may be assured'"); Aguilar v. Texas, 378 U.S. 108, 111 (1964) (independent review of state judicial determination of "probable cause").

A similar independent analysis rightly applies to the Godfrey issue presented in the instant case. For notwithstanding the state courts' satisfaction that the "especially heinous ... or depraved" circumstance served its appointed state-law function of setting Mr. Jeffers' case apart from some unstated "norm" of first-degree murders in Arizona, that circumstance, thus interpreted and applied, is "so vague" and "so broad" that it "vitiate[s] the [federal constitutional] role of the aggravating circumstance in guiding ... sentencing discretion," with "the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman [has] occur[red]." McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Gregg v. Georgia, 428 U.S. at 195 n.45.

As the Eleventh Circuit recognized soon after Godfrey, unraveling precisely the same state and federal functions that Arizona attempts to obscure by tying in knots here:

> The question is not whether we agree with the sentencing court that appellant [under state law] should receive the death penalty. See note 51 supra [discussing the application of Jackson v. Virginia to that question]. ... Rather, the issue we must decide is whether the construction of the ["especially heinous"] factor evinced by the [state] court[s'] application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards. See Godfrey v. Georgia, 446 U.S. at 427-33.

Proffitt v. Wainwright, 685 F.2d at 1263.

The latter issue, without doubt, is a federal legal issue requiring independent federal judicial consideration. It is the issue that the majority posed and resolved below, correctly under Godfrey. Like the

dissent below, the State can avoid that issue only by disregarding the square holdings of both Godfrey and Maynard and arguing that the words "especially heinous ... or depraved," standing alone, are constitutionally sufficient. Respect for precedent and reality alike compel rejection of that argument.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted

James S. Liebman*
(Appointed by the Court)
435 W. 116th St.
Box B-16
New York, New York 10027
212-854-3423

Susan A. Kettlewell
Pima County Public Defender
Donald S. Klein
Frank P. Leto
Assistant Public Defenders
32 North Stone
Fourth Floor
Tucson, Arizona 85701
602-740-5300

*Counsel of Record